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CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY

AUGUST 9, 10, AND OCTOBER 4, 1988

Part 9

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TUESDAY, AUGUST 9, 1988

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 9:58 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick Leahy (acting chairman) presiding.

Also present: Senators Thurmond and Hatch.

Staff present: Steven J. Metalitz, chief nominations counsel; Andrew Rainer, investigative counsel; Robert Short, minority chief investigator; and Frank Klonoski, minority investigator.

Senator Leahy. Good morning. The Committee on the Judiciary will be in order.

I will put my opening statement in the record just so we can speed things up, as I will have to leave at 10:23 this morning for about 10 minutes to go and open the Senate and come back.

[The statement of Senator Leahy follows:]

SENATE COMMITTEE ON THE JUDICIARY
HEARING ON JUDICIAL NOMINATIONS

AUGUST 9, 1988, 10:00 A.M.

OPENING STATEMENT OF SENATOR PATRICK LEAHY

This morning the Judiciary Committee holds its 33rd hearing in this Congress to consider nominations to the lower federal courts.

Today, we will take testimony on four nominations. Judge John M. Duhe of Louisiana, who is currently a District Court judge, has been nominated to serve on the U.S. Court of Appeals for the Fifth Circuit. The other three nominations are for the District Courts: Judge James R. McGregor, for the Western District of Pennsylvania; Norwood C. Tilley, for the Middle District of North Carolina; and Judge Lewis T. Babcock, for the District of Colorado.

As we customarily do, we will hear first from Senators and members of the House of Representatives who wish to introduce nominees to the Committee. Before we begin, let me note for the record that these nominees, like all other nominees before the Committee, have completed extensive questionnaires on their qualifications, experience, and financial situation. The publicly available portions of these questionnaire responses will be printed in the record of this hearing. We will keep the record open for follow-up questions to the nominees, and for additional questions that may be submitted by members of the Committee who are unable to be present this morning. We will also include in the record the complete introductory statements of Senators and House members.

STATISTICS ON JUDICIAL NOMINATIONS PROCESSING

(Reflects activity through 8/9/88)

As of today, the committee will have acted on 84 of 113 judicial nominations received, or 74%. Five nominations were withdrawn before the committee could act. If these five are excluded, the committee has acted on 78% of all judicial nominations.

After today, there will be 12 judicial nominations that have not yet been the subject of hearings. More hearings will be held on August 11, and in September. Four of these 12 nominations have been pending one month or less.

The committee has held hearings on 44 judicial nominees since the Second Session of Congress convened. In the same time period, the President has made only 34 nominations. Thus, the committee is ahead of the Executive Branch's pace this year.

100th CONGRESS
NOMINATIONS STATISTICS

(Reflects activity through 8/9/88)

COURT	RECEIVED	HEARING	COMMITTEE ACTION	SENATE ACTION
SUPREME	2	2	2	2
CIRCUIT	24	19	17	15
DISTRICT	81	72	60	57
CLAIMS	6	5	5	4
TOTALS	113	98	84	78

One Circuit Court nomination withdrawn before hearing.

One District Court nomination withdrawn after hearing; one withdrawn before hearing.

One District Court nomination awaiting formal withdrawal.

One Claims Court nomination returned without hearing to President under Senate rule XXXI, and not resubmitted.

One District Court nomination held over at Committee by Republican Senator.

Senator **Leahy**. As we have to stop at noon, we will ask Senators who wish to introduce their nominees—I know how proud they are of their nominees, but I would ask that they may want to keep it brief because I know no Senator would want to be so fulsome in his introduction that, as a result, we went beyond noon and his nominee might not get heard and would have to wait until after the recess, until September.

Any Senator can speak as long as he would like, but I certainly would not want anybody to advertently cause any of these nominees to have to go over until September for that.

I see Senator Sanford and Senator Helms here, and I wonder, gentlemen, if you would come forward. I know you have Mr. Tilley here, and perhaps you could introduce him to the committee.

Senator **Sanford**. I will defer to my senior colleague, Mr. Chairman.

Senator **Leahy**. Senator Helms, it is good to see you, and good to see you continuing to look better every day.

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator **Helms**. Well, thank you. I wish Mrs. Helms thought that.

Mr. Chairman, after your gentle and persuasive exhortation, I am tempted to say amen and put my statement in the record, but I expect I had better not do all of that. I will put most of it in the record.

I want to thank you and this distinguished committee for the privilege of presenting my good friend, N. Carlton Tilley, whom we call Woody, to this committee. President Reagan has made an excellent choice in nominating Woody to be a U.S. district court judge for the Middle District of North Carolina.

Woody is a native of Rock Hill, South Carolina, I may say to the distinguished ranking member of the committee. Since being graduated from Wake Forest College and then the Wake Forest University School of Law in 1969, he has been an active practitioner in the U.S. District Court for the Middle District of North Carolina.

He clerked for 2 years with the able U.S. District Judge Eugene A. Gordon, one of the most respected district court judges in the Nation. In September 1971, he became assistant U.S. attorney in the Middle District, and in January 1974 by judicial appointment he became the youngest U.S. attorney in the country.

He was subsequently nominated U.S. attorney by the President and confirmed by the Senate. While in the U.S. attorney's office, Woody was extremely active in both the trial and appeal of many cases.

He was an instructor at the first Attorney General's Advocacy Institute at Georgetown University in 1974, where he was praised highly by then Attorney General Bill Saxbe for his extemporaneous cross-examination.

Since leaving the U.S. attorney's office in 1977, Woody has specialized in Federal litigation, both civil and criminal, and as his questionnaire demonstrates, he has successfully represented clients in a number of significant, complex cases.

I am going to skip a little bit, but I assume that all of this will be made a part of the record, Mr. Chairman.

Senator LEAHY. Certainly, the whole statement will be part of the record.

Senator HELMS. In 1980, Woody taught a course in Federal courts at the Wake Forest Law School while Professor George Walker was on sabbatical. He lectured on the Federal rules and Federal courts to classes at the Duke University School of Law, the University of North Carolina at Greensboro, North Carolina A and T University, Guilford College, and Greensboro College, and he has spoken on these topics to civic groups, legal secretarial associations, and on public television.

Now, for his finest accomplishment, he married Greta Medlin on September 25, 1970. Mrs. Tilley, the first two-time winner of the American Society of Newspaper Editors Distinguished Writing Award, won the Ernie Pyle Award in 1987 for human interest reporting.

Incidentally, her story receiving the most attention concerned a White House press luncheon at which she was seated next to the President. The headline for her story read, "The President Does Not Dye His Hair." Mrs. Tilley now teaches journalism seminars and is writing a novel.

In short, Mr. Chairman, I have known Woody Tilley for a long time and I can personally attest to his character, his dedication, his competence, and his sense of personal responsibility.

In 1974—and I am not going to go into this in detail, but it is in my prepared text—one of the most remarkable citizens of North Carolina, Dr. Carroll Weathers, had some fine things to say about Woody Tilley.

Dr. Weathers served with distinction as dean of the Wake Forest Law School. He said that it was a great pleasure to present to this court Mr. Tilley, and so forth, but I hope that the committee will take a look at what Dean Weathers said about Woody Tilley at that time.

Mr. Chairman, Woody Tilley has received the highest accolades from people of both political parties in North Carolina. He was rated well qualified by the American Bar Association.

I have full confidence that Woody will become a Federal judge of the highest caliber and I, of course, hope that the committee will act expeditiously on this nomination.

Thank you, sir, very much.

Senator LEAHY. Thank you very much.

If there is anyone who knows I am 48, I can assure you I do not dye mine either. It turned naturally white, I think, when I was about 40 years old.

Senator HELMS. Well, I do not dye either one of my hairs, Mr. Chairman.

[The statement of Senator Helms follows:]

NOMINATION OF N. CARLTON TILLEY

Mr. HELMS. Mr. Chairman, I am grateful for the privilege of presenting my friend, N. Carlton (Woody) Tilley to the Committee. President Reagan made an excellent choice in nominating Woody to be a U.S. District Court Judge for the Middle District of North Carolina.

Woody is a native of Rock Hill, South Carolina. Following his graduation from Wake Forest College, and then the Wake Forest University School of Law in 1969, he has been an active practitioner in the United States District Court for the Middle District of North Carolina.

First, he clerked for two years with the able U.S. District Judge Eugene A. Gordon, one of the most respected District Judges in the nation. In September 1971, Woody became an Assistant United States Attorney in the Middle District; and in January 1974, by Judicial Appointment, he became the youngest United States Attorney in the country. He was subsequently nominated U.S. Attorney by the President and confirmed by the Senate.

While in the U.S. Attorney's office, Woody was extremely active in both the trial and appeal of many cases. He was also an instructor at the first Attorney General's Advocacy Institute at Georgetown University in 1974 where he was praised by then Attorney General William Saxbe for his extemporaneous cross-examination.

Since leaving the U.S. Attorney's Office in 1977, Woody has specialized in federal litigation, both civil and criminal. As his questionnaire demonstrates, he has successfully represented clients in a number of significant, complex cases.

He has also been involved in the academic side of the law. He has lectured at statewide legal education seminars on various federal litigation topics, including both substantive law and trial technique. He has, on numerous occasions, sat as a judge for law school appellate competitions, presided as trial judge in law school moot court trials, and helped prepare several Wake Forest University School of Law moot court trial competition teams for regional and national competition when the issues involved federal law or were being tried under the federal rules.

In 1980, he taught the course in Federal Courts at the Wake Forest Law School while Professor George Walker was on sabbatical. He has lectured on the federal rules and federal courts to classes at the Duke University School of Law, the University of North Carolina at Greensboro, North Carolina A & T University, Guilford College and Greensboro College. He has spoken on these topics to civic groups, legal secretarial associations, and on public television.

Woody married Greta Medlin on September 25, 1970. Mrs. Tilley, the first two-time winner of the American Society of Newspaper Editors' Distinguished Writing Award, won the Ernie Pyle Award in 1987 for Human Interest Reporting. Her story receiving the most attention concerned a White House press luncheon at which she was seated next to the President. The headline for her story read, "The President Does Not Dye His Hair." Mrs. Tilley now teaches journalism seminars and is writing a novel.

Mr. Chairman, I have known Woody Tilley for a long time, and I can personally attest to his character, dedication, competence and his sense of personal responsibility.

I am reminded of the formal ceremony in 1974 at which Woody took his oath of office as U.S. Attorney. One of North Carolina's most remarkable citizens, Dr. Carroll Weathers, who served with distinction as dean of the Wake Forest University School of Law, spoke of Woody. Dean Weathers said:

"It's a great pleasure to have the honor of presenting to this Court Mr. Tilley. He is quite a young man to have been commissioned with this highly important responsibility; but youth is not always determined by the years alone. Many are old early; others are young late. Mr. Tilley has the qualifications, from my observation and my confidence in him, to perform this office to the credit of his Government, to the credit of the judicial system, and to the credit of the people of the Middle District of North Carolina * * *. If I might be permitted this personal word, I had the privilege of being associated with Mr. Tilley for the three years that he was in Law School. I had the good fortune of being able to observe him in a manner that gave me an insight into his ability and into his character and into his worthy purpose; and that leads me to say that he had an experience beyond that of serving with Judge Gordon and with Mr. Osteen that has qualified him and brought him to this place. And that's the fact that he was born into the home of upright, honorable parents who have left an indelible impression upon his life. By their precept and example, Mr. Tilley has developed into what Justice Jackson referred to as the greatest quality of the federal prosecutor, and that is the marks of a gentleman. He is all of that. He possesses substantial ability. He possesses the purpose of doing that which is right * * *.

Mr. Chairman, while considering Woody for this nomination, I asked him whether there were any problems whatsoever that I should know about before recommending him to the President. He said that there was absolutely none—except for the fact that his wife is a Democrat. (I assured him that this is highly unlikely to be harmful to him.)

Seriously, Mr. Chairman, I might point out that if the Committee and the Senate are able to act on Woody's nomination before the recess, it would give Judge Richard Erwin the historically significant opportunity to become the first black Chief Judge in the North Carolina, and the second black Chief Judge in the South. Judge Erwin is richly deserving of that honor, and I hope he gets that opportunity.

Mr. Chairman, Woody has received the highest accolades from people of both political parties in North Carolina. He was rated Well-Qualified by the American Bar Association.

I have full confidence that Woody will become a federal judge of the highest caliber. I urge the Committee to act expeditiously on his nomination.

Senator LEAHY. Senator Sanford, you have spoken to me a number of times about this nomination. You have urged me to hold a hearing. I am glad to be able to accommodate that request.

One of the concerns I had when the committee received this nomination—we were advised by the Administrative Office of the U.S. Courts that Mr. Tilley had been nominated to fill a vacancy which occurred on April 29, 1988, and we have now been told that that is not quite true; that Judge Ward has not yet taken senior status and that there is not currently a vacancy in the Middle District of North Carolina.

I only mention that because, what we are trying to do for those where there are a number of vacancies, trying to move them along. But you have urged us to have this hearing and I am happy to have the hearing, and I would hope that the question of the vacancy might get resolved.

Senator Sanford, I yield to you, sir.

STATEMENT OF HON. TERRY SANFORD, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator SANFORD. Mr. Chairman, I thank you, and I thank you for holding this hearing and giving me an opportunity to make a statement.

I do not want this in the record, although I cannot let it pass without notice. I find it fascinating that Ms. Tilley won an award for creative writing with a story entitled "He Does Not Dye His Hair."

I am here to endorse Mr. N. Carlton Tilley to this committee, and I would say to Governor Strom Thurmond that he was born in South Carolina, but even though he was born in South Carolina, he recovered very quickly by being educated in North Carolina both at Wake Forest College and Wake Forest Law School. He and his wife, Greta, have made their home in Greensboro.

Since 1977, Mr. Tilley has practiced law as a partner in the firm of Osteen, Adams and Tilley, a very fine firm in Greensboro. Prior to that time, he served as U.S. attorney for the Middle District of North Carolina, and clerked for Judge Eugene Gordon of that district, certainly one of the outstanding district judges on the Federal bench.

His practice has focused almost entirely on litigation and he has lectured at seminars sponsored by the North Carolina Bar Association and the Academy of Trial Lawyers. In addition, he taught a course on Federal courts at Wake Forest University.

Mr. Tilley, as you know, has received a "well qualified" rating from the American Bar Association. Although I have not had an opportunity to know Mr. Tilley personally over these recent years, I have in recent months become acquainted with him through recommendations to me by a number of friends whose opinions I highly value, and I feel very confident in recommending without reservation Mr. Tilley for confirmation to this position.

Thank you very much.

Senator LEAHY. Thank you very much. Again, I appreciate your urging of this hearing, and again I want to emphasize, Mr. Tilley, our concern is not whether the committee can act on a nomination for a position that is not vacant. That is not the issue; of course, we can.

The concern was with the number of judges waiting for action where there are actual vacancies that have occurred for some time. It puts us into a kind of a bind, and we want to make sure that we are fair to everybody on this issue, especially those in other States.

Gentlemen, I thank you very much.

Senator SANFORD. Mr. Chairman, if you do not mind, I would like to excuse myself. I have another appointment.

Senator LEAHY. I understand you do, but I will yield to Senator Thurmond.

Senator THURMOND. Senator, if you could wait just a moment, on the point that has been mentioned here, I have a Justice Department memorandum that I think is right on the point, if you could wait about 2 minutes.

Senator SANFORD. I have read that.

Senator THURMOND. You have; you are familiar with that?

Senator SANFORD. Yes.

Senator THURMOND. Well, it is clear that they have got the right to do it.

Senator LEAHY. Nobody questions that, nobody questions that.

Senator SANFORD. I am not involved in that discussion, sir.

Senator LEAHY. Nobody questions that they have a right to do it. I have already said that.

Senator HELMS. Mr. Chairman, if I may be excused, but let me say that Judge Hiram Ward has told me repeatedly that the instant that Woody's nomination is confirmed, or when Judge Ward receives indications that Woody will be confirmed, he will take senior status. He is waiting to do that.

Senator LEAHY. I see.

Senator HELMS. And as the memorandum that I believe Senator Thurmond has, and I also have, indicates, there is no problem about the committee taking this action. It is done all the time, including the instance of a chief justice. So as soon as the Senate lets this young man go to work on the bench, Hiram Ward is anxious to go into senior status.

I thank the chairman and I thank Mr. Thurmond.

Senator LEAHY. Thank you.

Mr. Tilley, do you have members of your family and others here that you would just like to introduce?

Mr. TILLEY. Yes, Mr. Chairman, I do.

Senator LEAHY. Would you, please?

Mr. TILLEY. I have my wife, Greta, and my brother-in-law, Alan Medlin.

Senator LEAHY. Do you want to stand just so we can see who everybody is?

[The persons stood.]

Senator **Leahy**. There you go, thank you. We want that in the record because I am sure not only is this a little matter of the history of the Senate, but I am sure it is a matter of pride to you, sir, to have them here, and we wanted to do that.

If you could just step back for a few minutes while we get the other introductions, we have Senator Armstrong and Senator Wirth here, and I know that they wish to introduce Judge Babcock.

Gentlemen, again, as I said, we will break at just about 20 after for around 15 minutes while I go open the Senate and I will be right back, but feel free to take all the time you want.

Would you like to flip a coin? Well, we will go alphabetically. Senator Armstrong.

STATEMENT OF HON. WILLIAM L. ARMSTRONG, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator **Armstrong**. Thank you, Mr. Chairman. I am honored to be here to introduce to the committee a distinguished judge in our State, Lewis Babcock. He has been nominated by the President to be district judge for the District of Colorado.

I would like to report to the committee that not only have I carefully examined his qualifications, I have talked to any number of people who have practiced before him or who have known him during the course of his career, and I cannot recall any nominee or potential nominee who has been more warmly endorsed by a broader cross-section of the practicing bar in our State.

Judge Babcock was born in Rocky Ford, Colorado, educated in the public schools, graduated with honors from the University of Denver, earned a law degree from the University of Denver and, after graduating from DU, went back to his home town of Rocky Ford where he was in private practice.

He also served as city attorney for the city of Las Animas and for the town of Rocky Ford. He was appointed an assistant district attorney for the 16th judicial district in La Junta, and then in 1976 he was appointed to be a district judge for the 16th judicial district in Otero County and became, in 1983, the chief judge of that district.

His service and the reputation and the dedication and thoughtfulness with which he conducted himself as a judge earned him a wonderful reputation and, in consequence, in 1983 he was appointed to the Colorado Court of Appeals, a position in which he continues to serve.

Mr. Chairman, I would like to ask consent to insert in the record a more detailed summary of Judge Babcock's biography and accomplishments not only as an attorney and judge, but also his service in the community, in the National Guard, as an author, and in a number of other ways in which he has distinguished himself.

I would only add that it is my view that if confirmed by the Senate, Judge Babcock will not only serve well as a judge of the Federal court, but indeed with great distinction, and so I am particularly happy to be here to introduce him and urge his prompt confirmation.

[The statement of Senator Armstrong follows:]

ARMSTRONG STATEMENT ON LEWIS T. BABCOCK

NOMINATION AS U.S. DISTRICT JUDGE

August 9, 1988

Mr. Chairman, I am honored to be here today to introduce to the Committee the distinguished jurist Lewis Thornton Babcock, who has been nominated by the President to be a United States District Judge for the District of Colorado. I have had the pleasure of knowing Judge Babcock for some time in Colorado and I am convinced that the President made a superb choice for this important assignment.

Judge Babcock brings extraordinary experience and capability to this task. Indeed, his background is impressive, and he will be a great credit to the federal bench.

He was born and raised in Rocky Ford, Colorado in 1943 and educated in the public schools. He graduated with honors from the University of Denver in 1965, then went on to earn a law degree from the University of Denver Law School in 1968, and an L.L.M. from the University of Virginia School of Law just this year.

After graduating from law school in 1968, Judge Babcock established his own rural practice, Mitchell and Babcock, in his home town of Rocky Ford, a practice which flourished until 1976. During that time he also served as City Attorney for the town of Las Animas, and City Attorney for the town of Rocky Ford. He was appointed Assistant District Attorney for the Sixteenth Judicial

District in La Junta in 1973, and continued to distinguish himself as a thoughtful, fair, and dedicated advocate of law enforcement.

In 1976 he was appointed to be a District Judge for the Sixteenth Judicial District in Otero County, and in 1983 he was elevated to Chief Judge for that district. His service as a fair and impartial judge earned him a solid reputation in the Colorado legal community. In 1983 he was appointed to the Colorado Court of Appeals, a position he has held to the present time.

Judge Babcock also found time to serve in the Colorado National Guard for 6 years, and to publish at least two articles in Colorado legal journals. He has remained active in civic and community affairs to the extent permitted by his position, and is very well regarded in his community, and thoughout the state.

Judge Babcock, in addition to being a member of several bar associations, was a member of the Colorado Judicial Planning Council on Judicial Performance in 1979 and 1980. He is a member of the Colorado District Judges Association, the American Judicature Society, the American Law Institute, the Colorado Bar Foundation, and American Inns of Court. He also serves on the Civil Rules Committee of the Colorado Supreme Court, and the Colorado Judicial Advisory Committee to the State Supreme Court.

Mr. Chairman, Judge Lewis Babcock is a well respected Judge with a long record of judicial distinction. He will serve the nation well as a federal district judge, and I am pleased to encourage the committee to grant its consent to this nomination forthwith.

Senator **Leahy**. Thank you very much, Senator Armstrong.

Senator Wirth, we are glad to have you here.

STATEMENT OF HON. TIMOTHY E. WIRTH, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator **Wirth**. Thank you very much, Mr. Chairman, Senator Thurmond.

I would like to echo this morning's comments by the senior Senator from Colorado, Senator Armstrong. It is sometimes awkward to sit here and praise somebody when that person is here. They might start to believe all of the praise. In any case, Senator Armstrong's comments have reflected the overwhelming support and approval with which Judge Babcock's nomination has been received in the State of Colorado. I would like to reflect that support and approval as well.

As you know, Mr. Chairman, I have a very distinguished judicial review committee in Colorado which has conducted extensive discussions with Judge Babcock and members of the community. The judicial review committee represents judicial and political perspectives from all over the State of Colorado, I met with the committee and its response on Judge Babcock was overwhelmingly positive.

It is wonderful to see that happen. I cannot tell you, Mr. Chairman, how many difficulties that we have had over the years with judicial appointments in the State of Colorado.

Judge Ebel was sworn in a couple of weeks ago. He also was given the kind of unanimous and enthusiastic support that Judge Babcock has received. I would hope that this committee might move rapidly in considering Judge Babcock's nomination so that he can be confirmed and can sit on the bench, which sorely needs his presence, expertise, and wisdom.

I have a statement which I would like to include in full in the record, if I might, Mr. Chairman.

Senator **Leahy**. Without objection, it will be.

Senator **Wirth**. Thank you very much.

[The statement of Senator Wirth follows:]

Statement of Senator Timothy E. Wirth

JUDGE LEWIS T. BABCOCK
NOMINEE FOR THE FEDERAL DISTRICT COURT OF COLORADO

Mr. Chairman, I am pleased to be here today to welcome Judge Lewis Babcock, from my own home town of Boulder, who has been nominated to the federal district court in Colorado.

Judge Babcock, who has sat on the Colorado Court of Appeals since 1983, will bring more than twenty years of experience in the practice of law to the federal bench. He has had a breadth of service in the justice system that extends from City Attorney to Assistant District Attorney and which includes seven years as a district judge, five years as the Chief District Judge and five years as a state appellate judge.

The American Bar Association has found Judge Babcock to be well-qualified for the position of federal judge. My own bipartisan, judicial review committee, comprised of Colorado lawyers and judges, was unanimous in its conclusion that Judge Babcock is fully qualified to become a federal judge.

Judge Babcock has been nominated to fill one of three vacancies on the federal bench in Colorado; one has existed since July of 1984, another since May of 1985 and the last since just March of this year. The citizens of Colorado join me in welcoming this hearing and in urging that this nomination be confirmed at the earliest convenience of the Committee. In view of this nominee's outstanding credentials, I am very hopeful that we will be able to install Judge Babcock on the federal bench in Colorado without delay.

I would like to commend you, Mr. Chairman, the ranking member, Senator Thurmond, the other members of the committee and all of the staff for moving so expeditiously to consider Judge Babcock's nomination.

Senator LEAHY. Thank you, and I appreciate both of you coming. I know that both of you also have about a dozen other assignments you are supposed to be at, and you can trust Senator Thurmond and I to naturally put Judge Babcock through just a rigorous cross-examination, but a very fair one.

Judge, if you have members of your family here or any friends here, please introduce them to us so that we have that on the record.

Judge BABCOCK. Thank you, Mr. Chairman, Senator Thurmond. It is my pleasure to introduce to you my wife, Judy, and my daughter, Katherine. My son, John, 19, is attending school at the School of the Art Institute in Chicago in his final week for the summer semester. He is unable to attend.

Thank you, sir.

Senator LEAHY. Well, I can well understand, but we will note his name in the record, too, as being with you at least in spirit. As I mentioned earlier to your wife and your daughter, this must be a very, very proud moment for them, and I just wanted it on the record so when you have the transcript for the Babcock family archives, you can have that in it.

Senator WIRTH. Mr. Chairman?

Senator LEAHY. Yes, sir.

Senator WIRTH. If I might note at this point as well, there has been some discussion in various parts of the press in the State of Colorado that the judicial nominating process has become politicized.

I just want to say that from my perspective, and I think that this can be echoed by Senator Armstrong, we have done everything that we can to move these nominations as quickly as possible. Judge Babcock's nomination is confirmation of the fact that everybody in the State of Colorado believes that filling these vacancies is vital.

We would strongly urge the committee to move this appointment forward as rapidly as possible. Colorado needs this appointment and I hope that the committee moves with haste.

Thank you very much, Mr. Chairman.

Senator LEAHY. Thank you. I appreciate that, and we will. Thank you very much, sir, and if you could just step down, too, for a moment, I see Senator Breaux and Judge Duhe here. I wonder if you might come forward.

Without objection, a statement by Senator Johnston will be placed in the record.

[The statement of Senator Johnston follows:]

STATEMENT OF
SENATOR J. BENNETT JOHNSTON
BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
REGARDING THE NOMINATION OF
JOHN M. DUHE, JR.
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AUGUST 9, 1988

Mr. Chairman and Members of the Committee:

I am very pleased to appear before the Committee this morning for the purpose of introducing to you Judge John Malcolm Duhe, Jr. of New Iberia, Louisiana, nominee to the United States Court of Appeals for the Fifth Circuit.

It is fitting that an individual of Judge Duhe's high standards and eminent qualifications was nominated for this critically important position.

Judge Duhe comes to the Committee with impressive credentials, having served as United States District Judge for the Western District of Louisiana since 1984. Mr. Duhe is a 1957 graduate of the Tulane University School of Law. While at Tulane, he served as Editor-in-Chief of the Law Review and as a member of the Order of the Coif.

Upon graduation from Law School, Judge Duhe returned to New Iberia to practice law with the firm of Helm, Simon, Caffery and Duhe. In 1978, he withdrew from the firm in order to assume the duties as Judge of the Sixteenth Judicial District Court of Louisiana.

Mr. Duhe is a member of the American Bar Association, the Louisiana State Bar Association and the Louisiana Association of Defense Counsel.

It is important to note that during these years of public service, Judge Duhe has served with distinction in a number of responsible positions outside of government. He has been very active in his community as President and member of the Board of the New Iberia Tuberculosis Association. In addition, he has served on several Tulane Law School Alumni Committees, and in 1980 he was selected "Outstanding Alumnus" of Tulane's Law School.

I have known Judge Duhe for several years and have found him to be very professional and competent as a jurist and community leader. Moreover, I am certain that he possesses the necessary judicial temperament to serve on the United States Court of Appeals for the Fifth Circuit.

Judge Duhe's supporters represent a wide spectrum of political and philosophical viewpoints--a living testimony to his capabilities and to his equitable approach to jurisprudence.

In short, I believe that Judge Duhe possesses the integrity, appropriate demeanor, and aptitude for legal scholarship that will enable him to serve well and with distinction, if he is confirmed.

Mr. Chairman, Judge John M. Duhe is very well qualified to serve as a Judge to the United States Court of Appeals for the Fifth Circuit and I strongly urge the Committee to act favorably on his nomination.

Finally, I would like to thank the Committee for its consideration of Judge Duhe's nomination and would ask that the Committee move to recommend the confirmation of Mr. Jacques L. Wiener, Jr. to the United States Court of Appeals for the Fifth Circuit as soon as possible.

STATEMENT OF HON. JOHN BREAUX, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator **Breaux**. Thank you, Mr. Chairman, and Senator Thurmond.

You are correct. I think Senator Johnston is participating in an Interior appropriations conference meeting. Otherwise, he would join Judge Duhe and myself to present Judge Duhe.

The Fifth Circuit Court of Appeals, as you know, Mr. Chairman, is a very busy circuit, one of the busiest in the Nation. Louisiana has always felt that we have been underrepresented on the Fifth Circuit Court of Appeals, and today it is my privilege to introduce to the committee a good Louisianian in the finest Cajun tradition, Mr. Chairman, that will represent not only our State but also the entire United States very well in the Fifth Circuit Court of Appeals.

Nominees that come before this committee have character, they have integrity, they have honesty. Those are essential criteria for anyone to even be nominated for a position as a circuit court of appeals judge.

Judge Duhe has all of that, but he has, in addition, experience, background, training, professional qualifications that he brings to this position that I know will endear him very well in service on the Fifth Circuit Court of Appeals.

This nominee has experience as a practicing attorney for something over 20 years, 21 years, in which his practice has been a broad-based practice across the board in dealing with the issues that he will be now considering on the Fifth Circuit Court of Appeals.

But even more important than that, he has served as a State district court judge, hearing all types of cases in southern Louisiana for five years. He has served as a federal district judge for an additional four years.

In his practice and in his sitting on the bench, he has heard every type of case imaginable that could possibly work its way up to the Fifth Circuit Court of Appeals. Mr. Chairman, I would submit that this is the type of person with this kind of background that we need on our courts of appeals, people who know what it is all about, people who have been there before, people who have served in that circuit as an ad hoc judge.

So I think that this nominee that Senator Johnston and I both enthusiastically support will make the type of Fifth Circuit Court of Appeals judge that we can all be proud of, and we will look back and say that these are the types of qualifications these nominees should possess. So we unequivocally recommend and endorse him this morning.

Senator **Leahy**. Well, I appreciate that very much, and I would note, Judge Duhe, that both Senator Breaux and Senator Johnston have urged me privately to get this nomination up, and while we had not originally planned to have the hearings this week because of the crunch of legislative business just before we break for the Republican National Convention, I have tried very much, partly because of their urging, to make sure this went on today.

I have a lot of respect for both Senator Johnston and Senator Breaux, as I believe we all do. When they say they want to have this hearing and want you here, I think that is good enough for most of us around here.

I wonder, Judge, if you have members of your family or friends who are here that you might like to introduce.

Judge DUHE. Unfortunately, tropical storm Beryl has kept my family from joining me.

Senator LEAHY. Well, I hope they are safe and well, and we look forward to maybe some other time seeing them. But, certainly, what we will do before the record is completed, we will make sure that the names of all of them are included in the record.

Judge DUHE. Thank you, Mr. Chairman.

Senator LEAHY. And I do hope that they are safe and secure back home. I saw the weather maps this morning; I know that is quite a problem.

We will stand in recess for just 15 minutes while I go and open the Senate and then we will come back so we can get going on this.

[Recess.]

Senator LEAHY. I understand that Senator Hatch would like to introduce Mr. McGregor, and that there are also some members of the House. I apologize if I overlooked them before. Perhaps I will turn it over to you, Senator Hatch.

Senator HATCH. Senator, why don't we accommodate the Members of the House? What I would like to do is, after everybody is introduced, I would like to have Judge McGregor go first, if we could.

Senator LEAHY. That will be fine with me.

Senator HATCH. That will be fine.

Well, let me just say this. I lived in Pittsburgh for a number of years and knew the McGregor family. I graduated from law school with Judge McGregor's brother, Jack, and I have known Judge McGregor for many, many years and my experience has always been very fine.

I think very highly of him, and wish you the very, very best, as I think this will go very well for you and I believe that you will make a very fine Federal court judge, and I look forward to supporting your nomination in committee and on the floor. Basically, I have known Judge McGregor for a long time and I feel that he will make an excellent Federal court judge.

In addition, I want to apologize for both Senators Heinz and Specter because both of them intended to be with you here today and to testify in your behalf. So they asked me to mention that to the Judiciary Committee, but it just happens to be that George Bush is in Pennsylvania today and both of them felt that they had to be with him, and I think you fully understand that.

They wish you the best and will support you completely and fully every step of the way as you rise to this elevated position, and we just want to express that for them on their behalf.

Senator LEAHY. Any statement by Senator Heinz and Senator Specter will be put in the record.

I had been asked to be with Governor Dukakis today, but because Senator Specter and Senator Heinz were eager to have this, I had assured them I would be here for your hearing.

Senator **Hatch**. That is that delightful, wry sense of humor from Vermont. Don't pay any attention to it.

Senator **Leahy**. Believe me, nobody pays any attention to anything I do around here anyway, Judge McGregor, so there is no reason why you should have to. I am an inconsequential cog in the wheel, as Senator Thurmond and Senator Hatch have all the real power up here. I want you to know that.

Senator **Thurmond**. Mr. Chairman, I just wondered——

Senator **Leahy**. Senator Thurmond, good to hear from you, sir.

Senator **Thurmond**. I just wondered, since you decided not to be with Governor Dukakis today, if you felt you were just wasting your time. [Laughter.]

Senator **Leahy**. Well, I don't see any members in your party willing to place heavy bets on your nominee this year, and for good reason, I might say. It is not just your well-founded reputation for fiscal conservatism, but it probably also shows a great deal of political prognostication this year.

Representative Coyne, you didn't come over here to listen to us go through a song and dance routine up here. I do appreciate your taking the time to come over, sir. I know that you have an extraordinarily busy schedule today, and it is very good of you to be here and I yield to you, sir.

STATEMENT OF HON. WILLIAM COYNE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. **Coyne**. Thank you, Senator. I just want to say it is a great pleasure for me to be here and to have the opportunity to come to the committee and to the Senate to recommend a very able justice in the city of Pittsburgh that I represent, that I have known over the years and been friendly with, an outstanding jurist who has done yeoman's service for the court in Pittsburgh and western Pennsylvania.

It is a great personal pleasure for me to be here with his nomination today, and I want to commend him as highly as I can to the Senate of the United States, and to say that we in western Pennsylvania, the city of Pittsburgh, are in need of additional Federal jurists, being that we have two vacancies on the court.

I just want to be here today to commend Judge McGregor to you and to urge his confirmation as quickly as the Senate sees fit.

Thank you very much.

Senator **Leahy**. Thank you very much, sir. I certainly do not feel that you have to stay. I do know that you have a busy schedule and we took you later than we thought.

I was wondering, were there other members of the House?

[No response.]

Senator **Leahy**. If not, Judge McGregor, would you like to introduce any members of your family or others who might be here?

Judge **McGregor**. I would like to introduce my wife, Margie McGregor; Mark McGregor, our son; Russell McGregor, our lawyer son from Pittsburgh; and Katie McGregor and Michelle McGregor, our daughters.

Senator **Leahy**. It is nice to have you all here.

Judge McGREGOR. Back in the back row is our daughter-in-law, Beth Ann McGregor and our only granddaughter, Samantha, aged two. I also have——

Senator LEAHY. Okay, Samantha, you keep this place in line. [Laughter.]

Judge McGREGOR. I am also very proud today to introduce to you Jim Flaherty, a friend of mine from Pittsburgh, the president of the Baskin law firm, who is past president of the Academy of Trial Lawyers of Allegheny, and he is also the present chairman of Governor Casey's judicial nominating commission. He also is chairman of the Rules Committee for the Supreme Court for the whole State of Pennsylvania.

His wife, Katie, is here; also, Jim Wymard and his wife, Sara, are here. Jim is a past assistant district attorney in Allegheny County, and legal counsel to the Pittsburgh police in days gone by. They came the whole way up from South Carolina, from Hilton Head, to be here today.

Senator THURMOND. They must be mighty good people if they are from down that way. [Laughter.]

We are proud of you.

Judge McGREGOR. I also know that our daughter, Michelle, when she was about 5 or 6 years old, fell off a diving board at Hilton Head and broke her arm. We had trouble getting medical services in those days at Hilton Head.

Meyer Burger is supposed to be here, a businessman friend from Pittsburgh, but he has not arrived. His plane is coming in this morning.

Senator LEAHY. Thank you very much.

Senator HATCH. If I could add, Mr. Chairman, having Jim Flaherty here has cost Pittsburgh a lot economically just to have him gone one day because he makes so much money at the practice of law. [Laughter.]

Senator LEAHY. Judge McGregor, Senator Hatch has asked if we could take you out of turn, and we will.

Judge McGREGOR. Okay.

Senator LEAHY. If you would just raise your right hand, do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge McGREGOR. I do, Senator.

Senator LEAHY. In keeping with my tradition, no matter how much grief I get from the Senator from Utah, we always accede to his wishes, and so we will take you first.

I did not know whether you wanted to make any kind of an opening statement, sir. It is not required, but if you did, feel free.

TESTIMONY OF HON. JAMES R. McGREGOR, PITTSBURGH, PA, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Judge McGREGOR. It is not necessary.

Senator LEAHY. Thank you.

Judge McGREGOR. I wanted to be here, though, sir. I mean, I want you to know that.

Senator **Leahy**. Well, we are delighted to have you.

I just want to take a minute and go down through some of the chronology of this nomination. First, I want to note for the record the two main reasons that this hearing has not been held before now.

One is the fact that the administration let this vacancy stay open for nearly 3 years before they even nominated somebody to fill it and nominated you. The second reason has been the slow response of the Justice Department to this committee's requests for additional information.

Now, some of these requests were made by a member of this committee, I believe, about 2 years ago, almost 2 years ago. Others were made by the committee in early June. We actually received almost no substantive response to these requests until about a week prior to this hearing.

In fact, some of the information was received late Friday afternoon. I had stayed here late to see whether it was going to come up because I was supposed to go to Vermont. In fact, I think that perhaps even the reason for getting that was that I raised with Governor Thornburgh at his nomination hearing this concern that I had that the Justice Department has been so slow in answering questions on nominations.

They have been very quick in issuing press releases about how they are concerned about this committee going slowly, and they are very quick to have not on-the-record meetings with the press, and spend an inordinate amount of time doing off-the-record meetings with the press telling them how slowly we are going.

But I am delighted to see that they are finally—and I give Governor Thornburgh's confirmation hearing perhaps credit for this, that they are moving forward because I know they had responded—for example, in your case they responded much more quickly than in other cases, and I would hope that what appears to be, at least on the face of it, a pattern of different time in responding to questions for different individuals is purely coincidental, and not, as some more cynical members—well, there is no cynicism, of course, from people from Vermont, but from other States, might be cynical enough to think that there is a reason for that.

Now, some of the allegations, I know, you are familiar with, and some we will do in written questions, but let me just go down through a number of things.

As I said, the vacancy was created in 1985, more than 3 years ago, in the Western District of Pennsylvania. The Judicial Conference of the U.S. designated that as a court facing a condition of judicial emergency because of longstanding vacancies there. Yet, as I said, it took nearly 3 years for the administration to nominate someone to fill the seat where there was a condition of judicial emergency. As I understand it, the Senators from Pennsylvania, after considering the recommendations of their judicial screening committee, sent your name to the White House in January 1986. That was 2½ years ago. Your nomination was stalled in the Justice Department for more than 2 years before the President nominated you.

Now, is that chronology correct so far?

Judge **McGregor**. That is correct, sir.

Senator LEAHY. I want that chronology on the record because I know that Senator Thurmond has been concerned about delaying your case. He was perhaps not aware of that and I wanted him to hear it.

The chronology, though, also raises a question about what problems the Justice Department had with your nomination that caused this protracted delay. I understand you were interviewed at the Justice Department in approximately July of 1986, is that correct, sir?

Judge McGREGOR. That is correct, sir.

Senator LEAHY. It was about a year later that the Department moved your nomination to the stage of seeking the opinion of the American Bar Association and conducting an FBI background investigation.

Did you ever receive any explanation of the problem; I mean, why they took that year between the time they interviewed you and the time they sent off for the FBI backgrounder?

Judge McGREGOR. The Justice Department seemed to have some difficulty on my appellate record, and the investigation that they made about that record seemed to reveal that I had been reversed a lot more frequently than I actually had been because they did not take into consideration any of the memorandum opinions that are not published by the West Publishing Company.

Therefore, it became necessary for us to do a very elaborate and extensive check on the number of cases that I had presided over and the number that had been appealed. At that point in time, it was over 10,000 and only about 200 had been appealed and my rate of affirmance was excellent by, I think, any standard.

Once those statistics were revealed—for instance, there was a case that another judge had ruled pre-trial on the matter and I inherited that decision, and I presided over the trial and, on appeal, the pre-trial ruling was the basis upon which the case was reversed and it was not my ruling at all, sir.

Senator LEAHY. Well, I was told that the Justice Department was unhappy with your record of rulings on cases under the fourth amendment. They felt that you had too often ruled that a search which led to the discovery of evidence was a violation of the Constitution. They spoke of some of the reversals, and that gave the Justice Department—at least in their discussions they said that that gave the perception that you may be soft on criminals.

I assume they asked you some questions about that because you said in your questionnaire that the interview process did, quote, "cause me to express my deep-seated belief in the fourth amendment of our Constitution."

Can you just give me some details about that, sir?

Judge McGREGOR. Yes. I was asked a question, Senator, about—during the last term, the Supreme Court of Pennsylvania at the time had indicated that the police officer was reasonable, but mistaken in his reasonable belief that he had probable cause to search one of our citizens. How did I feel about that?

And I said I have always personally been troubled that the thief may go free because a police officer has made an insignificant error, and what not, and I felt that our forefathers had been very proper in their informing the exclusionary clause because I think the exclusionary clause holds government to a little bit higher standard before they are going to interfere in the private lives of our citizens, and I do feel strongly about that, sir.

Senator LEAHY. Well, did they ask you whether you favored or had thoughts about the elimination of the exclusionary rule?

Judge MCGREGOR. They didn't specifically—they asked how I felt about that topic, yes, sir.

Senator LEAHY. About the elimination of it?

Judge MCGREGOR. Yes; do I feel that it should be eliminated or not. I was asked that question, yes, sir.

Senator LEAHY. Well, of course, the Supreme Court has carved out some exceptions to the exclusionary rule, but I don't know of any opinion that even suggested eliminating it. Did you——

Judge MCGREGOR. That has long been a debate among legal scholars as to whether it should be eliminated, sir.

Senator LEAHY. How do you feel?

Judge MCGREGOR. I never was asked to—I have felt that it is a proper rule and should not be excluded, eliminated.

Senator LEAHY. Well, I am a former prosecutor. We had an awful lot of hearings on this, and I sometimes thought I was in a difficult position because of the exclusionary rule, but I have never for a second thought that we should get rid of it. I think it is important to our own liberties of all of us.

Judge MCGREGOR. I have run for public office three or four times, Senator, and each time I have ever run the police have always supported and endorsed my candidacy.

Senator LEAHY. Thank you.

Judge MCGREGOR. I am proud of that.

Senator LEAHY. You know, you mentioned earlier your record and the concern about some reversals, but you were for a number of years a motions judge in criminal courts in Pittsburgh, were you not?

Judge MCGREGOR. Yes, sir.

Senator LEAHY. Did you get a fair amount of suppression hearings in there?

Judge MCGREGOR. I probably have done more than anybody in the history of our court because I did nothing else for a period of about 14 months. I was the judge that was acceptable to both the public defender and the district attorney of Allegheny County, and I probably have heard more suppression matters than any other judge in Allegheny County history.

Senator LEAHY. Did you have hundreds of hearings, thousands of hearings?

Judge MCGREGOR. Probably over a thousand, sir.

Senator LEAHY. And what percentage would you say you were reversed, actually reversed?

Judge MCGREGOR. On suppression alone?

Senator LEAHY. Yes.

Judge MCGREGOR. Gosh, I have never sorted out that statistic. I would say I probably was reversed about 20 percent of the time. Two of my reversals were—they even stated in their opinion, when I decided the case, I decided it properly, but by the time it got to the appellate courts they had changed their mind about that topic, but I had decided it in accordance with the law.

Senator LEAHY. Now, the Justice Department, I understand, in their interview with you subsequently when they discussed it among themselves, had some problems about your answers to questions about the scope of judicial authority to manage public institutions.

I guess this refers to the situation where courts have gotten involved in managing prison systems, and so on. Do you remember if they asked you about that?

Judge MCGREGOR. I don't know that I was ever specifically asked that question, Senator. My memory is that I really believed, to the extent to which it seems to me that Federal judges were running school districts and running prisons, that there was a—there certainly is a problem of increased taxation for our citizens by people who are not elected officials.

And I don't necessarily believe that maybe a Federal judge should involve himself in those kind of matters, but I think in our case in Allegheny County, in my opinion, now Chief Judge Cohill as far as the prison is concerned, and Judge Gerald Webber of the Western District of Pennsylvania in a school district situation, have done an outstanding and fair job as they have done it. I'm not necessarily convinced that it is a proper place for a Federal judge to be.

Senator LEAHY. Now, I also understand that the Justice Department after meeting with you were concerned about your decision on *Commonwealth* vs. *Futch,* F-u-t-c-h, and your responses to questions you were asked about this case in an interview. That was a case that had to do with the constitutionality of a claimed prosecutorial practice of challenging black potential jurors on account of their race.

Can you tell us more, and hold the microphone closeby so this young lady can hear?

Judge MCGREGOR. All right, excuse me. Clifford Futch in the case that I was presiding over had been convicted of the murder of a fellow inmate at the State correctional institution in Pittsburgh and had been convicted by a jury and sentenced to death.

On appeal—this was tried by another judge of our court. On appeal, the case was assigned to me for retrial. As the district attorney and the defense lawyer were engaged in the voir dire of the prospective jurors, among the first jurors that was called was a 47-year-old black Teamster who was interrogated by both the defense lawyer and the district attorney.

This particular juror could not have answered the questions, in my judgment, more fairly, and yet he was peremptorily struck by the district attorney, and the defense lawyer made a motion to have the entire panel dismissed because this is part of the district attorney's pattern when, there is a black defendant and a white victim, to use the peremptory challenge to strike blacks.

We conducted hearings for over a period of 2 weeks. No statistics had ever been kept at all on this, and I felt that I had sat in that court many times and seen what I perceived to be racism being practiced in my courtroom. I thought it was improper and wrong, and I decided to make a statement about it, and I did through the interrogation of about 80 witnesses over a period of 2 weeks.

And I ruled that they were engaged in that practice and they should cease and desist from doing that, et cetera. I was overwhelmingly reversed on appeal, and I think as we all know as we sit here today that that is now the law of the United States.

Senator LEAHY. The Supreme Court in 1986 actually adopted a rule very similar to yours?

Judge McGREGOR. That is right, sir.

Senator LEAHY. Are you proud of the ruling that you made in that case?

Judge McGREGOR. I am, sir; yes.

Senator LEAHY. The reason I ask this is that I am told that the Justice Department was unhappy with the views you expressed about these issues. In fact, that was the primary reason why your nomination was stalled in the Department for 1 to 2 years.

Now, if that information is correct, your views on these issues is the principal reason why the lawyers and litigants in the Western District of Pennsylvania have had to live with the longstanding unfilled vacancy on that court.

In other words, if it is true that the Justice Department is concerned about your ruling, a ruling which was subsequently found to be the ruling that should be made in this country by the U.S. Supreme Court—even though you were reversed on that one, the Supreme Court came out with the same decision. It would be too bad if litigants are going without a judge because of that.

Judge McGREGOR. I can't speak for the U.S. Department of Justice, sir.

Senator LEAHY. I understand.

Senator THURMOND. Speak a little louder; speak in your microphone so we can hear you.

Judge McGREGOR. Okay.

Senator LEAHY. So let me ask you—you know, the relevant questions are not whether you took a view that might go against the ideology of the Justice Department, even though it is a view championed by the U.S. Supreme Court, but I think the relevant question is what your views would be as a judge.

So let me ask you this: Regardless of your personal views, if you are confirmed as a judge of the district court, will you have any difficulty in applying the fourth amendment and following the precedents that have been established under the fourth amendment?

Judge McGREGOR. No, I would not, sir, but it is a very constantly changing body of law, as you well know.

Senator LEAHY. I know it is a moving target. But regardless of your personal views, if you are confirmed, will you have any difficulty following the applicable precedents on the powers and limitations of the Federal courts in assuring that public institutions are managed in accordance with constitutional guarantees?

Judge McGREGOR. I do not, sir.

Senator LEAHY. And regardless of your personal views, if you are confirmed, will you have any difficulty following the applicable precedents on the right of the prosecution to exercise peremptory challenges and the constitutional limitations on that right?

Judge McGREGOR. I would not, sir.

Senator LEAHY. Thank you. Let me go into an area that has raised some concern with some members of the committee, and that is your relationship with a man named Tony DeCello. I understand Mr. DeCello is a longtime friend of yours.

Judge McGREGOR. That is right.

Senator LEAHY. You have known him about 25 or 30 years, something like that?

Judge McGREGOR. Yes, sir.

Senator LEAHY. In fact, am I correct that he was the one who encouraged you to sit for the bar exam and open a law practice?

Judge McGREGOR. That is right, sir.

Senator LEAHY. I also understand that he has been convicted and found guilty of theft and surrendered his license to practice law in order to avoid disbarment. Is that correct?

Judge McGREGOR. Well, the operative effect of surrendering your license is treated in Pennsylvania as a disbarment, sir. That is true.

Senator LEAHY. And so he no longer can practice law in Pennsylvania?

Judge McGREGOR. That is right, sir.

Senator LEAHY. Now, some people who frequent the courthouse where you now work report that at least until recently Mr. DeCello was often found in your chambers. He would come in there frequently, use your telephone, leave your telephone number as a place where people could call him. Is that true?

Judge McGREGOR. It is true, sir.

Senator LEAHY. Is that a common practice or was it limited to Mr. DeCello?

Judge McGREGOR. No, it wasn't a common practice. You know, we have three telephones. Our telephones are used every day by lawyers, friends, police officers. You know, frequently people would utilize the phone service that we have. We have a WATS line for the United States of America. He and others would come in from time to time.

It reached the point where I would say not frequently, but about 2 years ago, that my staff and I became concerned about the frequency with which he seemed to be there, and we took steps to correct that and he no longer has been there. You know, he is infrequently there. Maybe two or three times, maybe four times in the last year he has been there, sir.

Senator LEAHY. Was there a particular incident of him using your office that concerned you? Was there a particular incident of him using the office that concerned you, or was it just the number——

Judge McGREGOR. Yes. One day, I remember vividly. Not only had I heard complaints from my secretary about the frequency of his being there, but he—one day he seemed to have a meeting that I thought was totally inappropriate to be occurring in my chambers.

I was unaware that it was scheduled and I came off the bench and this meeting was going on, and that is when I decided that something had to be done dramatically to alter what seemed to be developing into a pattern, and I did something about it, sir.

Senator LEAHY. I understand that in the court you are dealing with an old friend. There are various practices there, but let me ask you this. You want to be a Federal judge, and that sort of puts a certain stamp on a judge—lifetime position, great power, a lot of prestige, but a lot of responsibility.

If you become a Federal judge, are you going to allow Mr. DeCello or any other person that has been convicted and is a disbarred lawyer to use your judicial chambers?

Judge McGREGOR. I would not, sir.

Senator LEAHY. I yield to my distinguished senior colleague and friend.

Senator THURMOND. Thank you, Mr. Chairman.

I just have two questions I would like to ask you, Judge McGregor. Where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Judge McGREGOR. Well, sir, I believe in the whole concept of separation of powers, and I believe that all the legislative powers should be done by the elected legislators, Senators, Congressmen, sir, and I believe that the judge should merely interpret those laws and they should be interpreted in accordance with prior decisions.

And you have to go back sometimes into what the congressional would be as to your interpretation of any given statute, but I don't believe that a judge should be a legislator, sir.

Senator THURMOND. As you know, some judges have taken over prisons, some of them have taken over school districts, some of them have taken over various institutions of the State, and they are running those things.

A judge's job under the tripartite system of government that we have, where the Congress makes the law, the President administers the law, and the courts interpret the law, it seems, is clear, but, just frankly, some judges let their power go to their head. I have seen them in instances where they have done that.

They have got all the power in the world and there is no reason why they should not be humble. The highest position in the land should be filled by the humblest person.

Judge McGregor, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution, as that judge interprets it?

Judge McGREGOR. I believe that he should follow the appellate courts, sir. It is for the court of appeals and for the Supreme Court of the United States to chart the way for judges, and stare decisis is a very big part of our system and I certainly would decide any case in accordance with the appellate decisions.

Senator THURMOND. We may have a few more questions, but that is all I have. Thank you, Judge.

Judge McGREGOR. All right, thank you.

Senator THURMOND. That is all I have right now, Mr. Chairman.

Senator LEAHY. Thank you.

Senator Hatch, I notice Congressman Walgren is here and I wonder if you would mind if we just yielded to him.

Senator **Hatch**. I would be glad to do that.

Senator **Leahy**. Congressman, why do you not come forward, sir? I know you also have an inordinately busy schedule this morning over on the other side, and I appreciate your coming here.

STATEMENT OF HON. DOUG WALGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. **Walgren**. Well, you are kind, and I certainly hesitated to intervene in the direct presentation by Judge McGregor. I just want to express my appreciation for the opportunity to come over.

We have three Congressman from Allegheny County, Bill Coyne, who was here, Congressman Joe Gaydos, who could not be here, and myself. We all happen to be on the other side of the political system than Judge McGregor, but we all wanted to be here because he has been someone in our bar association and in the lawyering group in Allegheny County that has gained all our respect.

We would encourage you to look favorably on him. He has been a person that has been personally accessible, a friend, and yet somebody whom we all respect as a lawyer. We are proud of the contribution he has made to our community, and I wanted to come.

I had hoped to be here earlier to join in the introduction of him, but I appreciate the opportunity to interject that much in his behalf.

Thank you, Mr. Chairman.

Senator **Leahy**. Doug, thank you for coming over. I do appreciate it, and I know that you also have votes and committee meetings coming up and we appreciate your coming by.

Senator **Thurmond**. We are glad to have you with us.

Senator **Leahy**. Senator Hatch, did you——

Senator **Hatch**. I only had one question, and that is this. Jim, we have heard that you have frequently ruled in favor of suppression motions in your present judgeship, but you would, however, closely follow the present Supreme Court's rulings in dismissing motions where the officers acted in good faith?

Judge **McGregor**. I denied suppression many, many more times than I ever granted suppression, Senator.

Senator **Hatch**. Whichever it may be, what I am asking is that you will abide by the present Supreme Court rulings.

Judge **McGregor**. Absolutely, positively, sir.

Senator **Hatch**. Well, I am sure you would, and I just wanted to make that clear.

I just, again, want to compliment you and congratulate you for this opportunity to serve in this very important position in our country and wish you the very, very best as you do it.

Judge **McGregor**. Thank you, Senator.

Senator **Leahy**. Thank you very much, Judge McGregor. That is all I have. Senator Thurmond has said that he may want to submit questions and I may want to, also. I would also mention for the record—I have done this many times when Senator Thurmond is not here, but I am so pleased by one basic question that I think, Strom, I have heard you ask every time both when you have been chairman and when you have been ranking member, and that is what I call now the Thurmond lecture.

I would wish every judge in the country would listen to it, and that is that as a judge, you have enormous power and it is something that has to be exercised very, very carefully. A judge has the power to destroy people's careers or, by siding one way or the other or by just being arrogant, what he can do to destroy people in a courtroom.

The best judges are the ones that never use that power. Senator Thurmond's statement to judges for years is one I wish sometime would get printed up and every judge would have, what I call the Thurmond Rule, on their wall. We would have a far better judiciary in this country if they did.

Thank you, sir.

Judge **McGregor**. Thank you.

Senator **Hatch**. I wanted to thank you, Mr. Chairman, for allowing Judge McGregor to go first as an accommodation to me. I really appreciate it.

Senator **Leahy**. I am glad to do it.

Judge **McGregor**. Senator, Meyer Burger, my businessman friend from Pittsburgh, is here. He was not here before.

Senator **Leahy**. Yes. We have met on a number of occasions, and I am pleased to see you here, too, sir.

Mr. **Burger**. Thank you, Senator.

Senator **Leahy**. I want it in the record that you are here.

To get back on course, Judge Duhe, if you could come forward, please, sir, and raise your right hand, do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Duhe**. I do.

Senator **Leahy**. I appreciate you being here. As I said earlier, both Senator Johnston and Senator Breaux have spoken to me about you and strongly urged that we go forward. Senator Thurmond feels the same way, and I always try to do anything that Senator Thurmond, Senator Breaux, or Senator Johnston ask or tell me to do.

Did you wish to give an opening statement, sir?

TESTIMONY OF HON. JOHN M. DUHE, LAFAYETTE, LA, TO BE U.S. CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

Judge **Duhe**. Simply to thank the committee for taking up the matter at this time, and to thank Senator Johnston and Senator Breaux for their support and Senator Breaux for being here this morning.

Senator **Leahy**. Now, if we could just go down through a number of questions that have come up, one into an area that has been of some discussion lately, and that is private clubs.

The record shows that you are member of the Cypremort——

Judge **Duhe**. Cypremort.

Senator **Leahy**. How is that again?

Judge **Duhe**. Cypremort.

Senator **Leahy**. Cypremort Yacht Club in Louisiana. Now, I am told that there are no black members of this club, and the reason I ask this is you have been a Federal judge now for 4 years and I am sure you have considered whether your continued membership in this organization is consistent with the ethical obligation to avoid membership in any club that practices invidious discrimination.

Do you want to talk to me about it?

Judge DUHE. I'll be happy to. I suppose first I should say that that is a pretentious name for a small group of about 60 sailing enthusiasts. When you say "yacht club," most people tend to think of something much more grand than this particular little organization is.

It is a small sailing club of about 60 members. There are no black members in it. I have been sailing in my area for 8 to 10 years. I do not know of a single black who owns a sailboat or sails in the area.

I am told by the officers and directors of the sailing club that no black has ever applied for membership. There are women members, there are Jewish members, there are Mexican American members, but there are no black members.

I am, I think, reasonably well attuned to the problems there. My wife is a Mexican American, and I am aware from that standpoint of how invidious sometimes discrimination can be, but I am not aware that there is any such thing in that organization.

Senator LEAHY. And would it be safe to say that you have been aware of that question and have considered that?

Judge DUHE. Yes, sir.

Senator LEAHY. Thank you. In my home State of Vermont we have many yacht clubs, and I grant you that you sometimes have this image of an enormous place with multi-million-dollar yachts lined up and then you have other places with sailing enthusiasts.

I have thought sometimes of taking my farm in Vermont, which has a small stream running through it in the little town of Middlesex, Vermont, and having T-shirts made up of the Middlesex Yacht Club to go there.

Judge DUHE. Well, I'm the official bartender, and also the groundskeeper of this particular yacht club. [Laughter.]

Senator LEAHY. What you are saying is this is not a major operation?

Judge DUHE. Not at all, sir. We wish it were.

Senator LEAHY. One of the difficult decisions that I hear from judges that they have to make is when they sentence a defendant who has been convicted of a crime. Now, with you, that is not as abstract a question as it is with some who come here and are about to become a judge for the first time. You have had to make sentences.

What do you consider when you make that kind of a sentencing decision? What are some of the things that go through your mind, or how do you reach it? Maybe that is the best way to ask you. How do you reach that decision?

Judge DUHE. Well, I have always been in the habit of considering a number of things, the primary objective being to make the punishment fit the crime and the criminal. It is not enough, in my view, simply to have the punishment fit the crime; it must also fit the criminal.

And so I'm always very interested in knowing as much as I can about the individual and how he or she came to be involved in that particular problem. The advent of the new sentencing guidelines has opened my eyes to a number of things. I had developed a reputation as a State judge, and I think that followed me to the Federal bench, of being somewhat tough in my sentencing.

Now that the guidelines are available, I see I'm not so tough as the legislative branch of the government thinks that I should be. But, generally, my thrust has been to learn as much as I could about the individual and to try to tailor the punishment to the individual, and to doing something positive with that individual, if possible. It's not always possible.

Senator **Leahy**. I understand. One of the things you have had—and this really comes down to literally a life or death decision. You have been called upon to rule on habeas petitions from death row prisoners in Louisiana, and I understand that in a couple of those cases the death warrant has actually been signed.

Judge **Duhe**. Yes, sir.

Senator **Leahy**. I can only imagine what has to go through a judge's mind when such a request comes to him, knowing someone is on death row and a warrant has been signed.

Just recently, Chief Justice Rehnquist announced that he was going to appoint a judicial conference committee, and I think he is having retired Justice Powell head it up, to study whether the federal courts are responding adequately to the challenge raised by this. There is a mounting number not just in Louisiana but all over the country of habeas petitions to federal courts from death row inmates.

Are these being handled adequately now? I mean, if you were before the Powell commission and they asked you what suggestions would you make, Judge Duhe, on these habeas petitions, what suggestions would you make?

Judge **Duhe**. Habeas petitions for death row inmates present, of course, a totally different set of problems than the other types of habeas requests that we get, and obviously when you get one from a death row inmate, you certainly become aware of the real weight of the responsibility that you have.

One of the serious problems that faces the judiciary is the practice that has come up of defense counsel waiting until the last minute to file in order to use the time factor to get a stay, simply because you cannot make a reasonable, rational investigation in the time that is allowed. That is very disconcerting.

If there were a way that we could afford the courts adequate time to investigate without the necessity of staying a State court's execution date, I think that would help the courts, and it would also help the perception that the general public has of the system of justice in this country.

The general public very often looks down upon a situation where a Federal court stays a State execution because, of course, the general public rarely understands the factors. If we could do away with that bad image and establish a system whereby the Federal judiciary at all levels, not just the district level, would have the adequate time to consider these very, very serious things, I think that would help a great deal.

My other recommendation would be that we find some way, and at this point I don't know what that way would be, but we find some way to stop the multiple applications, and yet still afford each habeas petitioner a full opportunity to have every issue heard.

Senator **Leahy**. Well, when I was district attorney, I could guarantee that anybody I prosecuted that got a sentence of more than 1 year—and that was a lot of them because I had a reputation of always recommending just about the maximum sentence, so much so that a defense attorney, Strom, once when asked at a sentencing hearing after I had made my recommendation—he was asked if he had any request and he said he had only one. If he ever had to have a heart transplant, he wanted the prosecutor's heart because it had never been used. [Laughter.]

Well, we could guarantee that any time anybody went away for more than a year that we were going to face habeas petitions not only in the State court but in the Federal court, and usually a suit against me and against the judge of various kinds. I think they just ran a xerox machine down at the State prison and just changed the names and ran these things through.

So you can get kind of blase in a way and say, oh, well, it is one more; let us see which one of a half a dozen words they might have changed from the one before. The Federal court would just kind of dismiss these in a kind of a wholesale fashion. That is one way.

But if somebody comes to you and a death warrant has been signed, I mean now you are right down to the nitty-gritty. I mean, depending upon what you decide, the person may be executed or may not.

Should that be dismissed without even having an oral argument?

Judge **Duhe**. I think it's possible to deal with them without argument if——

Senator **Leahy**. And you have?

Judge **Duhe**. And I have, if the documents and the record from the State court are adequate. In many instances, they are not, and not only argument but an evidentiary hearing is required. But I think it's often quite possible to deal with them without argument. We have——

Senator **Leahy**. In a death case, should there be a predilection, at least, though, towards oral arguments?

Judge **Duhe**. I don't think necessarily so, because good lawyers say what needs to be said persuasively in the papers that they file, and oftentimes little or nothing gets added to that by having argument. It simply occupies some time.

As you know from your experience as a prosecutor, you put everything you had to say in the paper and when it came time to argue, it was probably the unusual circumstance when there was something additional. You may have said it differently, maybe more persuasively, in argument, but you had it all in the papers, or you tried your best to.

Senator **Leahy**. Thank you, Judge.

Senator Thurmond.

Senator **Thurmond**. Thank you, Mr. Chairman.

Judge, one of the criticisms of judicial activism is a tendency of the judiciary to use the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals.

Do you feel that this criticism is valid, and would you please explain your answer?

Judge DUHE. I think oftentimes it is a valid criticism. I think it's very, very important for judges to remember what our job is. We are charged with the responsibility of resolving real disputes between real people who have a particular interest in the outcome of that dispute.

We are not political scientists, we are not legislators. We are dispute resolvers, and our attention and focus should be on the resolution of a real dispute between real people.

Senator THURMOND. Judge Duhe, are there ever any circumstances under which a judge should attempt to establish new judicial precedent, and if so, what criteria would you consider in order to determine the propriety of reversing existing precedent?

Judge DUHE. Well, when it comes to reversing existing precedent, you have to first of all be in the position to do that, and up until now I've been a district judge and never in the position to reverse much of anything.

But stare decisis is an extremely important aspect of our system, but one need not be a slave to it. If there had not ever been thoughtful reexamination of precedent, we would never have had the decision in *Brown* v. *Board of Education* that we have, for example.

So simply because something has been the rule does not mean that it should not be reexamined. Reexamination, thoughtful reexamination is occasionally called for, but we shouldn't, simply because we are judges perhaps in a position to do so, throw away valid precedent without giving serious consideration to why it's there.

Senator THURMOND. That is all the questions I have. I wish you a happy service on the bench.

Judge DUHE. Thank you, Senator.

Senator LEAHY. You listened to the Thurmond rule before, though, so we don't have to repeat it.

Judge DUHE. Yes, sir, I have.

Senator LEAHY. Okay, thank you.

Judge DUHE. Thank you, Mr. Chairman.

Senator LEAHY. Thank you very much, Judge Duhe; good to have you here. Again, as I said before, I hope all is well with the storm back home.

Judge DUHE. Thank you, sir.

Senator LEAHY. Mr. Tilley, you have been very patient. Please come forward. Will you raise your right hand? Do you solemnly swear the testimony you shall give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. TILLEY. Yes, sir, I do.

Senator LEAHY. Mr. Tilley, did you wish to make any kind of an opening statement?

TESTIMONY OF NORWOOD C. TILLEY, JR., GREENSBORO, NC, TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Mr. TILLEY. No, sir, Mr. Chairman. I'm just deeply honored to be here before the committee this morning.

Senator LEAHY. Thank you. When I looked over your background and I took a pile up to my farm in Vermont over the weekend to kind of look down through things—incidentally, I should say to all judicial nominees that they should always come here before this committee a couple days after I have been back home because I am always in a better mood, even though I hate to leave.

Some members of Senator Thurmond's party have hated to see me leave, too. Maybe they wanted to keep me there permanently.

But you had a question there about pro bono work, and that is, frankly, something I look at in virtually every judicial nominee. I do it going back to my days when I was a brand new lawyer in a law firm where the senior partner was a conservative, lifelong Republican. In fact, I was one of the few Democrats I think he ever had in there.

And he used to just drum into all the new lawyers that you are going to have a favored place in the community; you are going to have status, money, and everything else you would not have if you were not lawyers, and you had darned well better do pro bono work. He did everything from his church group to helping people on just about every kind of thing there was, and he just really drove that into us.

Now, I notice in yours you have a long list of pro bono work, including helping a disabled woman to obtain Social Security disability benefits, defending an elderly man on criminal charges, helping a young man with cancer to compel insurance coverage for his hospital expenses. You served as director of a wildlife preservation club, as a law professor, as a lecturer of continuing legal education seminars.

I think that probably states the answer to this next question, but tell me your view of pro bono work.

Mr. TILLEY. Mr. Chairman, when I was in law school, Dean Carroll Weathers, a gentleman that Senator Helms referred to this morning, emphasized to us the importance of a lawyer's role in the community, including doing work for those who were not able to pay for it.

And along with Dean Weathers, my wife, Greta, who was introduced before the committee this morning, has also presented me with people from time to time who needed assistance, and I do feel like that is part of a lawyer's obligation to that lawyer's community to help those who may not be able to otherwise afford a lawyer.

Senator LEAHY. Do me a favor, Mr. Tilley. If you go on the Federal bench, when you are asked to speak at bar association meetings and other things, every so often just kind of throw that in just to remind all the lawyers there that they keep that responsibility.

Some law schools are very good about it, incidentally, and especially some of our best law professors also drum that in, but it does not hurt every so often sometimes, especially among the senior bar where you get a little more comfortable, to remind them what they heard about when they were in law school that it is good to go out and spend a little time giving a little back to the community.

It is the same in any profession; I mean, the medical profession and legal profession, though, especially. There is so much that we can give as lawyers to people who would not have it otherwise.

Mr. TILLEY. I certainly agree, Mr. Chairman, and I will do that.

Senator LEAHY. You responded to a question in the committee's questionnaire about potential conflicts of interest and you said, quote, "Obviously, I could not hear any matters concerning clients of my present law firm." Does that mean it to be limited to cases involving clients of your current firm, or does it include cases in which lawyers in your firm appear as counsel?

The reason I ask this is that standard practice, I think, has been for judges to recuse themselves at least for several years in cases in which former partners appear. Is that what you meant?

Mr. TILLEY. Yes, sir. I would avoid any appearance of impropriety, and one of my partners with whom I have tried a number of cases does appear with frequency in Federal court and he's the only one in my firm who does other than myself. But I would not anticipate hearing cases that he would be involved in for some time.

Senator LEAHY. That is a relatively easy thing to do, to recuse oneself from that. I mean, it makes it a little bit difficult at first, but you do not have any problem with that practice, do you?

Mr. TILLEY. No, sir. I think both of us would be more comfortable with that taking place.

Senator LEAHY. That is what I was going to say. Usually, it goes both ways.

Now, you have been both a prosecutor and a defense attorney. Have you thought about what you will do when you have to start sentencing those people? I mean, the question of sentencing is both the defense attorney and the prosecuting attorney. Now, you are the guy in the middle. Have you thought about what you are going to do?

Mr. TILLEY. Mr. Chairman, perhaps the new sentencing guidelines will somewhat alleviate that. I do worry about that, and I think anybody who may face the task of depriving another citizen of his or her liberty should worry about that. And all I can say is I would do my best to be fair under those circumstances then before me.

Senator LEAHY. Well, I have no further questions. Now that we have hit you with these hard-hitting questions just driving you right down to the mat, I will turn it over to Senator Thurmond for the soft balls.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Tilley, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does this phrase mean to you?

Mr. TILLEY. Just that, Senator Thurmond. That would be a tendency, I suppose, of judges going outside the authority of courts to take extra judicial action.

Senator THURMOND. Mr. Tilley, one of the characteristics of judicial activism is said to include a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities. Would you give the committee your views on this criticism?

Mr. TILLEY. Senator Thurmond, I think judges are ill-equipped, with insufficient staff to find facts, with insufficient training and expertise, to impose themselves as administrators of other institutions.

Senator THURMOND. I believe your wife had a career as a journalist?

Mr. TILLEY. Yes, sir.

Senator THURMOND. I believe the record shows she was the first two-time winner of the American Society of Newspaper Editors Award for non-dateline writing. Is that correct?

Mr. TILLEY. That is correct, Senator Thurmond.

Senator THURMOND. Winner of the Ernie Pyle Award?

Mr. TILLEY. Yes, sir. I'm very proud of her.

Senator THURMOND. A Pulitzer Prize finalist, and wrote articles on the mentally ill, teenage suicides, and the homeless. She is a nationally recognized lecturer on journalism, too, I believe?

Mr. TILLEY. Yes, sir.

Senator THURMOND. I notice you have here with you today Mr. Alan Medlin. Is that correct?

Mr. TILLEY. My brother-in-law, yes, sir.

Senator THURMOND. He is your brother-in-law. He married your sister?

Mr. TILLEY. I married his sister.

Senator THURMOND. You married his sister. He is one of the outstanding faculty members at the University of South Carolina Law School and we are very proud of him in South Carolina. He is an acknowledged expert on the South Carolina probate court and the editor of one of the ABA journals, and so you have good connections——

Mr. TILLEY. Yes, sir.

Senator THURMOND [continuing]. Aside from the fact that you were born in the best State in the Nation, South Carolina.

Mr. TILLEY. I was born well and married well, Senator.

Senator THURMOND. Now, Mr. Chairman, there is some question raised here about this appointment and making this appointment at this time, as well as some questions regarding this vacancy.

Go ahead. I will wait on you if you want to mention something to him.

With regard to the vacancy——

Senator LEAHY. I was just trying to accommodate another Republican Senator, Strom, that is all. I am sorry.

Senator THURMOND. Well, I did not want to interrupt.

Senator LEAHY. Thank you.

Senator THURMOND. With regard to the vacancy in the Middle District of North Carolina, let me quote from a 1968 Department of Justice memorandum pertaining to the specific power of the President to nominate and the Senate to confirm an individual for a prospective vacancy on the Supreme Court, which also speaks to the issue of the lower courts.

> As noted earlier, in recent years a very sizable number of Federal judges have retired, subject to the appointment and qualification of their successors. The Senate

> has confirmed their successors in the same way it acts on other nominations which are submitted in anticipation of a vacancy.
>
> The same is true of the situations very frequently in the lower Federal courts in which nominations have been made to replace incumbent judges being elevated to higher posts at the same time.
>
> There is nothing inconsistent with the Constitution in the practice of anticipatory nomination and confirmation in the present circumstances. To the contrary, this practice is sanctioned by the Constitution and the experience under it throughout our history.
>
> As President Kennedy wrote to Judge Prettyman in 1961, it has the beneficial effect that the court may not be handicapped for any time during which a vacancy might otherwise exist.

Mr. Chairman, a footnote in this 1968 memorandum states:

> Recently in connection with a nomination elevating a judge to a higher court and a simultaneously-submitted nomination designed to fill the vacancy caused by this elevation, the Senate confirmed the judge who was to fill the vacancy ahead of the one who was to be elevated. These were nominations dated October 6th, 1966, of John Lewis Smith, Jr., Chief Justice of the District of Columbia Court of General Sessions, to the U.S. District Court for the District of Columbia, and of Harold H. Green, vice the elevation of Judge Smith. The confirmation of Judge Green occurred on October 18, 1966, and that of Judge Smith on October 20.

Now, also, I want to ask unanimous consent to place in the record, Mr. Chairman, an article entitled "In Re Nomination of N. Carlton (Woody) Tilley, Jr., Middle District of North Carolina." I will just read an excerpt here.

"There is precedent for the Senate acting on and confirming nominations for positions not actually vacant. Examples of this in the 99th and 100th Congress include," and without reading all of that I just want to mention Chief Justice Warren Burger; James Hunter, III, of the Third Circuit; Donald Voorhees, Western District of Washington; Charles A. Moye, Jr., Northern District of Georgia; Ed Leavy, District of Oregon; Leroy Contie, Sixth Circuit; James Miller, District of Maryland; and Luther B. Eubanks, Western District of Oklahoma.

There is no question about this; the precedents are clear and there is no reason that this gentleman, Mr. Tilley, should not be acted upon now. It would cause no trouble at all. It is consistent with previous decisions and previous precedents.

Senator LEAHY. Would the Senator yield just a moment?

Senator THURMOND. I ask that, as I stated——

Senator LEAHY. Without objection, it will be part of the record.

[The information follows:]

IN RE NOMINATION OF N. CARLETON (WOODY) TILLEY, JR. MIDDLE DISTRICT OF NORTH CAROLINA

- August 24, 1987, Chief Judge Hiram H. Ward submitted letter to the President indicating his eligibility and intention to take senior status effective April 29, 1988, or as soon thereafter as his successor is appointed and qualifies.

- April 26, 1988, the President nominated Mr. Tilley, vice Ward.

- July 25, 1988, OLA received word indicating a possible misunderstanding regarding the date of vacancy, and Senate Judiciary Committee staff, as well as Senator Sanford's staff, indicate they do not view the Ward seat as "actually vacant." [The stated reasoning is that if the seat were vacant, the next judge eligible to become Chief Judge (Judge Erwin) could move into the Chief's position. Apparently, the Administrative Office of the Court has indicated that Judge Erwin cannot move into the Chief's position yet because it is still occupied by Judge Ward.]

- This misunderstanding apparently centers on the type of resignation letter submitted by Judge Ward. The language of Judge Ward's letter, e.g., announcing his desire and intention to take senior status on a given date, or as soon thereafter as his successor is appointed and qualifies, is submitted frequently by other judges. Among recent examples of other judges using similar language and thus resigning in this same way are:

    - Warren E. Burger, Chief Justice of the Supreme Court
    - James Hunter III, Third Circuit
    - Donald S. Voorhees, Western District of Washington
    - Charles A. Moye, Jr., Northern District of Georgia
    - James R. Miller, Jr., District of Maryland
    - Luther B. Eubanks, Western District of Oklahoma
    - Almeric L. Christian, District of the Virgin Islands
    - Christobal Duenas

- There is precedent for the Senate acting on and confirming nominations for positions not "actually vacant." Examples of this in the 99th and 100th Congress include:

    - Chief Justice Warren Burger indicated on 6/17/86 his intention to resign effective 7/10/86 or as soon thereafter as his successor qualifies. William Rehnquist was nominated on 6/20/86, was confimred on 9/17/86, and was appointed on 9/25/86.

- James Hunter III, Third Circuit, wrote to the President 1/31/86 indicating his intention to retire from active service effective 6/30/86 or at the close of court business on the date when his sucessor is confirmed. Robert Cowen, vice Hunter, was nominated 8/7/87, confirmed 11/6/87, and appointed 11/9/87;

- Donald Voorhees, W.D. Washington, indicated to the President on 1/22/86 his intention to take senior status effective the date his successor is appointed and sworn in. William Dwyer, vice Voorhees, was nominated 9/26/86, renominated 7/28/87, confirmed 9/17/86, and appointed 11/6/87;

- Charles A. Moye, Jr., N.D. Georgia, wrote to the President June 16, 1987 of his intention to resign effective 12/21/87 or upon the appointment and qualification of his successor. Jack Camp, vice Moye, was nominated on 12/18/87, confirmed on 4/19/88, and appointed on 4/20/88;

- Ed Leavy, D. Oregon, elevated to the Ninth Circuit, was nominated 2/2/87, was confirmed on 3/20/87 and appointed on 3/23/87. Malcolm Marsh, vice Leavy, was nominated on 2/2/87, confirmed 3/20/87, and appointed on 3/24/87;

- Leroy Contie, Sixth Circuit, wrote to the President 12/18/85 of his retirement effective 7/1/86. Alan E. Norris, vice Contie, was nominated 4/22/86, confirmed 6/6/86, and appointed 7/1/86.

- James Miller, D. Maryland, wrote 5/7/86 indicating his desire to resign effective on the nomination, confirmation and swearing-in of his successor. Frederic Smalkin, vice Miller, was nominated 8/15/86, confirmed 9/25/86, appointed 9/26/86, and entered on duty 12/1/86. (Judge Miller resigned 12/1/86.)

- Luther B. Eubanks, W.D. Oklahoma, wrote to the President 2/11/86, indicating his eligibility and desire to retire from active service effective 6/30/86, or upon the appointment and installation of his successor, whichever first occurs. Layn R. Phillips, vice Eubanks, was nominated on 2/2/87, confirmed 6/11/87, and appointed on 6/15/87.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 14 1986

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Senator Thurmond:

This letter is written to you as Chairman of the Committee on the Judiciary to discuss the respective powers of the President to nominate, and the Senate to confirm, an individual for a prospective vacancy on the Supreme Court. The Department of Justice has consistently maintained that the President has the power to nominate, and the Senate has the power to confirm, in anticipation of a vacancy which shall occur during the President's term of office. See, e.g., Department of Justice Memorandum re: Power of the President to nominate and of the Senate to confirm Mr. Justice Fortas to be Chief Justice and Judge Thornberry to be Associate Justice of the Supreme Court, July 11, 1968, printed in, Hearings before the Committee on the Judiciary, United States Senate, 90th Cong. 2d Sess., on Nominations of Abe Fortas and Homer Thornberry, Appendix, Exhibit 1 (1968) (copy attached).

A prospective vacancy on the Supreme Court arises when a Justice announces his or her intention to retire on a specific date, or upon the qualification of a successor.[1] A prospective vacancy also arises when an incumbent Justice is nominated for elevation to the Chief Justiceship. In any of these instances, the President has the power to nominate, and the Senate the power to confirm, in anticipation of the vacancy. This practice is entirely compatible with the constitutional plan and has been followed on numerous occasions.

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[1] 28 U.S.C. 371(b) provides in relevant part:

> The President shall appoint, and by and with the consent of the Senate, a successor to a justice or judge who retires.

This section does not prescribe the procedures or timetable for such appointments.

As explained in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 153-157 (1803), the constitutional appointment process consists of three major steps: (1) the nomination by the President; (2) the Senatorial advice and consent; and (3) the appointment by the President, of which the Commission is merely the evidence. Each step is essential to assumption of authority by the officer or Justice, as the case may be. Id.[2] Thus, the Constitution clearly permits the President to nominate, and the Senate to confirm, a successor while the incumbent still holds office. Confirmation does not confer any rights on the nominee; the President remains free to decide that he does not want to make the appointment, which is not legally completed until the execution of the commission. If the President nominates a person to be an Associate Justice of the Supreme Court in anticipation that an incumbent Justice will be elevated to the Chief Justiceship, and the Senate then fails to confirm the latter, thereby preventing the creation of a vacancy, the appointment, of course, cannot go forward.[3]

On several previous occasions, the President has simultaneously elevated a sitting judge and nominated his replacement. For example, Justice Shiras submitted his resignation to take effect on February 24, 1903. On February 19, President Roosevelt nominated (a) Circuit Judge Day to be Associate Justice of the Supreme Court, vice Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, vice Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, one day prior to the effective date of Justice Shiras' resignation. 34 Journal of the Executive Proceedings of the Senate, 202, 215 (hereinafter "Journal"). More recently, on December 11 1974, President Ford nominated Judge William J. Bauer of the Northern District of Illinois to replace Judge Otto Kerner on the Seventh Circuit. On the same day, the President also nominated Alfred Kirkland to the seat vacated by Judge Bauer's elevation. 116 Journal at 805.[4]

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[2] See also 4 Op. A.G. 217, 219-220 (1843); 12 Op. A.G. 32, 41-42 (1866); 36 Op. A.G. 382, 384-385 (1931).

[3] For example, when Justice Fortas' nomination to the Chief Justiceship was withdrawn in October 1978, after the Senate failed to end a filibuster preventing a vote on his elevation, the prospective vacancy for which President Johnson had nominated Judge Thornberry was eliminated.

In our view, the President's constitutional power to nominate Justices for anticipated vacancies is limited only by his term of office. A President should not be permitted, as a constitutional matter, to make a prospective nomination for a vacancy that shall occur after his term of office expires because such a power would encroach upon the appointment power of his successor. However, no such limitation exists, in the absence of a specific statutory prohibition, where the President nominates an individual for a vacancy which shall occur during his term of office.

For the above reasons, the Department of Justice believes that the President may nominate, and the Senate may confirm, individuals for anticipated vacancies on the Supreme Court which shall occur during the President's term of office. We hope this letter alleviates any remaining concerns on the part of members of your Committee.

Sincerely,

John R. Bolton
Assistant Attorney General

Attachment

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[4] Moreover, successors to district court judges who have been elevated to the court of appeals have frequently been nominated while the Senate is still considering the nomination of the incumbent. On December 15, 1970, while the Senate Judiciary Committee was considering the nomination of Judge Wallace Kent to the Sixth Circuit, President Nixon nominated Albert Engel to fill Judge Kent's seat on the district court for the Western District of Michigan. Judge Kent's elevation was approved a few days later. 112 Journal at 680, 682.

C

Department of Justice

July 11
1968

MEMORANDUM

Re: Power of the President to nominate and of the Senate to confirm Mr. Justice Fortas to be Chief Justice of the United States and Judge Thornberry to be Associate Justice of the Supreme Court

On June 13, 1968, Chief Justice Warren advised President Johnson of his "intention to retire as Chief Justice of the United States effective at your pleasure." In his reply, dated June 26, the President stated, "With your agreement, I will accept your decision to retire effective at such time as a successor is qualified." On the same day Chief Justice Warren sent to the President a telegram in which the Chief Justice referred to the President's "letter of acceptance of my retirement," and expressed his deep appreciation of the President's warm words.[1]

On June 26, the President also submitted to the Senate the nominations of Mr. Justice Fortas to be Chief

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[1] See Appendix I, Nos. 1-3 for the texts of the letters and telegram exchanged between Chief Justice Warren and the President. The letters appear in 4 Weekly Compilation of Presidential Documents 1013-14.

Justice of the United States vice Chief Justice Warren, and of Judge Thornberry, of the United States Court of Appeals for the Fifth Circuit, to be Associate Justice of the Supreme Court vice Justice Fortas. 114 Cong. Rec. (Daily Ed. June 26, 1968) S7834.

Questions have been raised as to the power of the President to make and of the Senate to confirm these nominations. The primary objection is based upon the assertion that there is at present no vacancy in the office of Chief Justice, and that nomination and confirmation of Mr. Justice Fortas is therefore improper. Secondarily, there seems to be an objection that nomination and confirmation of Judge Thornberry cannot be accomplished in these circumstances because the office to which he has been named is not yet vacant.

Neither objection appears to be well taken. The terms of Chief Justice Warren's retirement, established in the correspondence between him and the President, are that the Chief Justice's retirement will take effect upon the qualification of his successor.[2] Judge Thornberry has been nominated in anticipation of the elevation of Mr. Justice Fortas. As this memorandum will show, it is well established that the President has power to nominate, and the Senate power to confirm, in anticipation of a vacancy. This power exists where it has been agreed that retirement of an incumbent Justice or judge will be effective upon the qualification of his successor. Such power also exists where an incumbent Justice or judge is simultaneously nominated for elevation to a higher position.

I.

It is not unusual for a Justice or judge to advise the President of his intention to retire and to leave it to the President to propose a timing best suited to prevent an extended vacancy and the resulting disruption of the operation of the court on which he sits. Nomination of a successor in such circumstances is but one example of the power to fill anticipated vacancies.

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[2] The term "qualification" or "qualifies" refers in this context to the taking of the two oaths prerequisite to holding federal judicial office, (1) the oath to support the Constitution required by Article VI, clause 3 of the Constitution of all officers of the United States, and (2) that required by 28 U.S.C. 453 of each Justice or judge before performing the duties of his office.

The more general power will be analyzed below, but it is instructive first to consider two directly pertinent instances for which documentation is available.

Mr. Justice Gray of the Supreme Court advised President Theodore Roosevelt on July 9, 1902, that he had decided to avail himself of the privilege to resign at full pay, and added:

> "* * * I should resign to take effect immediately, but for a doubt whether a resignation to take effect at a future day, or on the appointment of my successor, may be more agreeable to you."

President Roosevelt's acceptance, two days later, contained the following passage:

> "It is with deep regret that I receive your letter of the 9th instant, and accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years. If agreeable to you, I will ask that the resignation take effect on the appointment of your successor. 3/

3/ See Appendix I, Nos. 4-5 for the pertinent passages of the Gray - Roosevelt correspondence.

Mr. Justice Gray died in September, before his successor, Mr. Justice Holmes, took office (187 U.S. iii).[4/] The Memorial Proceedings in honor of Mr. Justice Gray pointed out that "he submitted his resignation to take effect upon the appointment and qualification of his successor. So he died in office." See also Lewis, Great American Lawyers, Vol. 8, p. 163.

More recently, Circuit Judge Prettyman advised President Kennedy on December 14, 1961, that he intended to take advantage of the statutory retirement provisions of section 371(b), Title 28, United States Code, and continued:

> "The statute prescribes no procedure for retiring; accordingly I simply hereby retire from regular active service, retaining my office.
>
> "The statute provides that you shall appoint a successor to a judge who retires. Hence I am sending you this note."

President Kennedy replied on December 19:

> "It was with regret that I received the notification that you were retiring from

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[4/] The circumstances surrounding the Holmes appointment will be discussed *infra*.

> 'regular active service.' The way in which you phrased your letter left me with no alternative but to accept your decision."

A few days later, however, President Kennedy sent the following additional note to Judge Prettyman:

> "As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.
>
> "I appreciate your willingness to continue for this limited period in order that the Court may not be handicapped for any time during which a vacancy might otherwise exist."

Judge Prettyman replied to the President that he was "glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite."[5]

Judge J. Skelly Wright was nominated on February 2, 1962, confirmed on February 28, and appointed March 30.

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[5] See Appendix I, Nos. 6-9 for the pertinent passages of the Kennedy - Prettyman correspondence.

He qualified on April 16, and Judge Prettyman retired as of April 15.

The exchange of communications between Chief Justice Warren and the President must be understood in the light of these precedents. The Chief Justice advised the President of his intention to retire, leaving it to the President to suggest terms of retirement which would be suitable in allowing sufficient time for nomination and confirmation of a successor without the disruption and over-burdening of the remaining Justices which might result from an extended vacancy, in particular such a vacancy in the office of the Chief Justice. The President suggested that the Chief Justice's retirement should take effect upon the appointment and qualification of his successor. The Chief Justice agreed to this condition.

It is a condition of retirement that was used with respect to the Supreme Court in the case of Mr. Justice Gray. It has been frequently resorted to in the case of other judicial retirements. (For a partial list of retirements by federal judges effective upon the appointment and qualification of their successors, see Appendix II.)

The effect of this form of retirement is that the Chief Justice remains in office until the condition occurs; i.e., until his successor qualifies by taking the oaths of office.

II.

The power of the President to appoint Justices of the Supreme Court, by and with the advice and consent of the Senate, is specified in Article II, section 2, clause 2 of the Constitution. It provides that the President shall

> "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law * * *."

Article II, section 3 provides additionally that the President shall "Commission all the Officers of the United States."

As explained in Marbury v. Madison, 1 Cranch 137, 153-157 (1803), the Constitutional appointment process consists of three major steps:

> The nomination by the President;
>
> the Senatorial advice and consent (confirmation); and
>
> the appointment by the President, of which the Commission is merely the evidence.

See also 4 Op. A.G. 218, 219-220.

There is no indication in this early analysis of the constitutional appointment process that a matured vacancy is a necessary prerequisite. Nomination and confirmation to fill anticipated vacancies are consistent with the constitutional plan, and have been frequent occurrences in our history.

It should be noted that anticipated vacancies may be grouped into two categories: First, those that will take effect on a day certain; *e.g.*, when a resignation is submitted as of a specific date, or a statutory term is about to expire. Second, those that will take effect upon fulfillment of a condition; *e.g.*, when the removal or elevation of the incumbent takes effect, or the appointment and qualification of his successor. Nothing in the Constitution prevents advance nomination and confirmation to fill either category of anticipated vacancies. Logic and experience, running from the earliest years of the Republic to the present, support this conclusion.

If the Senate's power to confirm were conditioned on the present effectiveness of the vacancy, there would continually be gaps in the holding of important offices. In all cases, nomination, confirmation and appointment would have to wait until the incumbent leaves office. Interruptions in the discharge of public business would necessarily result. The needs of prudent administration suggest the unsoundness of a constitutional interpretation that would force this result upon every resignation or retirement of Presidential appointees.

As a matter of fact, from the earliest years the Senate has exercised the power to confirm nominations to offices in which a vacancy in the near future is anticipated to take effect, by action of the incumbent or of the President, as the case may be. The first volume of the Executive Journal of the Senate, covering the years from 1789 to 1805, gives instances in which the Senate confirmed nominees in the following situations: To fill a vacancy to be created by the promotion of the incumbent; to replace an official who desired to be recalled; to rename an officer whose term was about to expire; to replace an official who had resigned as of a day certain; and to replace an official about to be superseded. (For details as to these nominations, see Appendix III.)

This practical interpretation of the Constitution by the early Presidents and the Senate has been judicially supported in a number of Supreme Court decisions holding that an officer who serves at the pleasure of the President is ousted from his office when the President appoints a successor by and with the advice and consent of the Senate.

McElrath v. United States, 102 U.S. 426; Blake v. United States, 103 U.S. 227, 237; Mullan v. United States, 140 U.S. 240, 245. These rulings clearly presuppose that the Senate has the power to confirm a nomination while the incumbent is still in office.

The history of the Supreme Court contains several examples of actions, by Presidents and the Senate, to fill positions of Justices and the Chief Justice in advance of the effective date of the resignation or retirement of the incumbent:

1. Mr. Justice Grier submitted his resignation on December 15, 1869, to take effect on February 1, 1870. President Grant nominated Edwin M. Stanton in his place on December 20, 1869. Stanton was confirmed and appointed the same day, and his commission read to take effect on or after February 1. However, due to his death on December 24, Stanton never ascended to the Bench. See Warren, The Supreme Court - United States History (1937 Edition) Vol. 2, pp. 504, 506.

2. Mr. Justice Gray resigned on July 9, 1902, effective on the appointment of his successor (see supra, pp. 4-5).

On August 11, the newspapers announced that Oliver Wendell Holmes had been "appointed" to succeed Mr. Justice Gray. Bowen, Yankee from Olympus, 346. President Roosevelt had in fact on that day given Holmes a recess commission, which subsequently was cancelled. Holmes, who then was Chief Judge of the highest court of Massachusetts, apparently did not want to serve without prior confirmation by the Senate. Holmes - Pollock Letters, Vol. I, p. 103.[6/]

As shown above, Mr. Justice Gray died on September 15. The President nominated Holmes on December 2, the day after the Senate reconvened. The nomination was confirmed two days later. Journal of the Executive Proceedings of the Senate, Vol. XXXIV, pp. 5, 21. There can be no question but that President Roosevelt would have submitted the Holmes nomination to the Senate prior to Justice Gray's death, had the Senate then been in session.

[6/] See also a letter of August 21, 1902 from President Roosevelt to Holmes:

> "After consulting one or two people, I feel that there is no necessity why you should be nominated in the recess. Accordingly I withdraw the recess appointment which I sent you, and I shall not send you another appointment until you have been confirmed by the Senate, which I think will be two or three days after it meets. Meanwhile, I strongly feel that you should continue as Chief Justice of Massachusetts."

3. Mr. Justice Shiras submitted his resignation to take effect on February 24, 1903. On February 19, President Roosevelt nominated (a) Circuit Judge Day to be Associate Justice of the Supreme Court, vice Mr. Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, vice Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, one day prior to the effective date of Justice Shiras' resignation. Journal of the Executive Proceedings of the Senate, Vol. XXXIV, pp. 202, 215.

4. On September 1, 1922, Associate Justice Clarke tendered his resignation as of September 18. On September 5, President Harding nominated George Sutherland to succeed Mr. Justice Clarke. The Senate confirmed his nomination on the same day. 260 U.S. iii. The records of the Department of Justice indicate that Justice Sutherland's commission was dated September 5, "commencing September 18, 1922."

5. On June 2, 1941, Chief Justice Hughes announced that he would retire from active service on July 1. 313 U.S. iii. On June 12, President Franklin D. Roosevelt nominated Associate Justice Stone to be Chief Justice, and Attorney General Robert H. Jackson "to be an Associate Justice of the Supreme Court, in place of Harlan F. Stone, this day nominated to be Chief Justice of the United States." 87 Cong. Rec. 5097. The Senate confirmed Chief Justice Stone's nomination on June 27, and Associate Justice Jackson's nomination on July 7. 314 U.S. iv. 7/

These precedents relating to Supreme Court appointments thus show instances in which the Senate confirmed judicial nominations which were made in anticipation of a vacancy, either where a resignation or retirement was to

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7/ Chief Justice Stone took his oath on July 3 (314 U.S. iv), but the delay in Justice Jackson's confirmation until July 7 had no relation to that fact. The Jackson hearings, which commenced on the same day as the Stone hearings, took place over several days, June 21-30, and the Judiciary Committee reported on the nomination June 30. On the same day the Jackson confirmation by arrangement was put over until the next session for conducting substantial business of the Senate, which was July 7. 87 Cong. Rec. 5701,5756,5759 (1941).

take effect on a day certain (Stanton; Day; Sutherland; Stone), or where the nomination was vice an Associate Justice nominated to be Chief Justice (Jackson) or vice a judge nominated to be a Justice (Richards).[8]

As noted earlier, in recent years a very sizable number of federal judges have retired subject to the appointment and qualification of their successors. The Senate has confirmed their successors in the same way it acts on other nominations which are submitted in anticipation of a vacancy. (See examples in Appendix II.) The same is true of the situations, very frequent in the lower Federal courts, in which nominations have been made and confirmed to replace incumbent judges being elevated to higher posts at the same time. Thus, acceptance of the assertion that the Senate lacks the power to confirm Mr. Justice Fortas on account of the condition affecting the timing of Chief Justice Warren's retirement, or that it lacks the power to confirm Judge Thornberry at this time to replace Justice Fortas, would create serious doubt about the validity of the appointments of a sizable portion of the Federal judiciary.

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[8] Recently, in connection with a nomination elevating a judge to a higher court and a simultaneously submitted nomination designed to fill the vacancy caused by that elevation, the Senate confirmed the judge who was to fill the vacancy ahead of the one who was to be elevated. These were the nominations, dated October 6, 1966, of John Lewis Smith,Jr., Chief Judge of the District of Columbia Court of General Sessions, to the United States District Court for the District of Columbia, and of Harold H. Greene, vice the elevation of Judge Smith. 112 Cong. Rec. 25524. The confirmation of Judge Greene occurred on October 18, 1966, and that of Judge Smith on October 20. 112 Cong. Rec. 27397, 28086.

There is nothing inconsistent with the Constitution in the practice of anticipatory nomination and confirmation in the present circumstances. To the contrary, this practice is sanctioned by the Constitution and the experience under it throughout our history. As President Kennedy wrote to Judge Prettyman in 1961, it has the beneficial effect that the "Court may not be handicapped for any time during which a vacancy might otherwise exist."

Appendix I

1. Letters from Chief Justice Warren to President Johnson, dated June 13, 1968:

a. My Dear Mr. President:

Pursuant to the provisions of 28 U.S.C., Section 371(B), I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure.

Respectfully yours,
Earl Warren

b. My Dear Mr. President:

In connection with my retirement letter of today, I desire to state my reason for doing so at this time.

I want you to know that it is not because of reasons of health or on account of any personal or associational problems, but solely because of age. I have been advised that I am in as good physical condition as a person of my age has any right to expect. My associations on the court have been cordial and satisfying in every respect, and I have enjoyed each day of the fifteen years I have been here.

The problem ofage, however, is one that no man can combat and, therefore, eventually must bow to it. I have been continuously in the public service for more than 50 years. When I entered the public service, 150 million of our 200 million people were not yet born. I, therefore, conceive it to be my duty to give way to someone who will have more years ahead of him to cope with the problems which will come to the Court.

I believe there are few people who have enjoyed serving the public or who are more grateful for the opportunity to have done so than I. I take leave of the Court with the warmest of feelings for every member on it and for the institution which we have jointly served in the years I have been privileged to be part of it.

With my very best wishes for your continued good health and happiness, I am

Sincerely,
Earl Warren

2. Letter from President Johnson to Chief Justice Warren dated June 26, 1968:

My Dear Mr. Chief Justice:

It is with the deepest regret that I learn of your desire to retire, knowing how much the nation has benefited from your service as Chief Justice. However, in deference to your wishes, I will seek a replacement to fill the vacancy in the office of Chief Justice that will be occasioned when you depart. With your agreement, I will accept your decision to retire effective at such time as a successor is qualified.

You have won for yourself the esteem of your fellow citizens. You have served your nation with exceptional distinction and deserve the nation's gratitude.

Under your leadership, the Supreme Court of the United States has once again demonstrated the vitality of this nation's institutions and their capacity to meet with vigor and strength the challenge of changing times. The Court has acted to achieve justice, fairness, and equality before the law for all people.

Your wisdom and strength will inspire generations of Americans for many decades to come.

Fortunately, retirement does not mean that you will withdraw from service to your nation and to the institutions of the law. I am sure that you will continue, although retired from active service as Chief Justice, to respond to the calls which will be made upon you to furnish continued inspiration and guidance to the development of the rule of law both internationally and in our own nation. Nothing is more important than this work which you undertook so willingly and have so well advanced.

Sincerely,
Lyndon B. Johnson

3. Telegram from Chief Justice Warren to President Johnson, dated June 26, 1968:

THE PRESIDENT
THE WHITE HOUSE

DEAR MR. PRESIDENT: MY SECRETARY HAS READ TO ME OVER THE PHONE YOUR LETTER OF ACCEPTANCE OF MY RETIREMENT. I AM DEEPLY APPRECIATIVE OF YOUR WARM WORDS, AND I SEND MY CONGRATULATIONS TO YOU ON THE NOMINATIONS OF MR. JUSTICE FORTAS AS MY SUCCESSOR AND OF JUDGE HOMER THORNBERRY TO SUCCEED HIM. BOTH ARE MEN OF WHOM YOU CAN WELL BE PROUD, AND I FEEL SURE THEY WILL ADD TO THE STATURE OF THE COURT.

EARL WARREN

4. Letter from Mr. Justice Gray to President Theodore Roosevelt, dated July 9, 1902:

Dear Mr. President,

Being advised by my physicians that to hold the office of Justice of the Supreme

> Court for another term may seriously endanger my health, I have decided to avail myself of the privilege allowed by Congress to judges of seventy years of age and who have held office more than ten years. I should resign to take effect immediately, but for a doubt whether a resignation to take effect at a future day, or on the appointment of my successor, may be more agreeable to you.
>
> Wishing that the first notice of my intention should go to yourself, I have not as yet mentioned it to any one else.
>
> Very respectfully and truly yours
> Horace Gray

5. Letter from President Roosevelt to Mr. Justice Gray, dated July 11, 1902:

> My dear Judge Gray:
>
> It is with deep regret that I received your letter of the 9th instant, and accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years. If agreeable to you, I will ask that the resignation take effect on the appointment of your successor.
>
> It seems to me that the valiant captain who takes off his harness at the close of a long career of high service faithfully rendered, holds a position more enviable than that of almost any other man; and this position is yours. It has been your good fortune to render striking and distinguished service to the whole country in certain crises while you have been on the court - and this in addition of course to uniformly helping shape its action so as to keep it

up on the highest standard set by the great constitutional jurists of the past. I am very sorry that you have to leave, but you go with your honors thick upon you, and with behind you a career such as few Americans have had the chance to leave.

With warm regards to Mrs. Gray, believe me,

Faithfully yours,
Theodore Roosevelt

6. Letter from Judge Prettyman to President Kennedy, dated December 14, 1961:

Dear Mr. President:

On October 17th last, I had been on the court sixteen years. In August I was seventy years old. Being thus qualified I wish to take advantage of the statute (Sec. 371(b) of Title 28, U.S. Code) which says a judge with such qualifications "may retain his office but retire from regular active service". The statute prescribes no procedure for retiring; accordingly I simply hereby retire from regular active service, retaining my office.

The statute provides that you shall appoint a successor to a judge who retires. Hence I am sending you this note.

With great respect I have the honor to be

Yours sincerely,
E. Barrett Prettyman

7. Letter from President Kennedy to Judge Prettyman, dated December 19, 1961:

Dear Judge Prettyman:

It was with regret that I received the notification that you were retiring from "regular active service." The way in which you phrased your letter left me with no alternative but to accept your decision.

I was pleased, however, that you were retaining your office and would be available to continue your distinguished service on the Bench. Your record for justice and humanity, your efforts in behalf of more efficient administration of the law, and your legacy of sound precedent entitle you to some relaxation from the demands of regular active service.

I am happy that you have elected to continue in the capacity of chairman of the Administrative Conference. I am looking forward to receiving the recommendations and suggestions which flow from the meetings of the Conference. It seems to me that this offers an opportunity to make a major contribution toward the improvement of the regulatory agency procedures. Under your leadership I am sure that the Conference will take advantage of that opportunity.

With every good wish, I am

Sincerely yours,
JOHN F. KENNEDY

8. Letter from President Kennedy to Judge Prettyman, dated December 26, 1961:

Dear Judge Prettyman:

As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.

I appreciate your willingness to continue for this limited period in order that the Court may not be handicapped for any time during which a vacancy might otherwise exist.

Sincerely,
JOHN F. KENNEDY

9. Letter from Judge Prettyman to President Kennedy, dated January 2, 1962:

My dear Mr. President:

I have your note of December 26th. I am glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite. I shall advise the keepers of the records to enter my retirement upon the date when my successor qualifies.

May I take advantage of this opportunity to express to you my deep appreciation of your generous remarks regarding my service.

With great respect, I am

Yours sincerely,
E. BARRETT PRETTYMAN

Appendix II

By letter dated February 24, 1968, Judge Wilson Warlick, North Carolina, Western, retired effective upon the appointment and qualification of his successor. James McMillan was nominated on April 25, appointed June 7, and entered on duty June 24. Judge Warlick retired June 23.

By letter dated March 30, 1967, Judge Frank M. Scarlett, Georgia, Southern, retired effective upon the appointment and qualification of his successor. To date no one has been appointed and he is still on the bench in regular service.

By letter dated November 28, 1966, Judge Frank A. Hooper, Georgia, Northern, retired effective upon the appointment and qualification of his successor. Newell Edenfield was nominated May 24, 1967, appointed June 12, and entered on duty June 30. Judge Hooper retired June 29.

By letter dated September 21, 1965, Judge William G. East, Oregon, retired effective upon the appointment and qualification of his successor. Robert Belloni was nominated February 21, 1967, appointed April 4, and entered on duty April 10. Judge East retired April 9.

By letter dated March 12, 1965, Judge William C. Mathes, California, Southern, retired effective upon the appointment and qualification of his successor, or not later than June 30, 1965. Irving Hill was nominated May 18, appointed June 10, and entered on duty June 25. Judge Mathes retired June 9.

By letter dated February 19, 1964, Judge Walter M. Bastian, D. C. Circuit, retired effective upon the appointment and qualification of his successor. Edward A. Tamm was nominated March 1, 1965, appointed March 11, and entered on duty March 17. Judge Bastian retired March 16.

By letter dated March 26, 1963, Judge David W. Ling, Arizona, retired effective upon the appointment and qualification of his successor. C. A. Muecke was nominated August 17, 1964, appointed October 1, and entered on duty October 12. Judge Ling retired October 11.

A number of other instances early in this century of retirements to be effective upon the appointment and qualification of the successor have been assembled from incomplete records of the Department of Justice. It is believed that in these cases the successor was appointed between the date of the announcement of retirement as shown in the third column and the effective date of retirement as shown in the fourth column.

NAME	COURT	ANNOUNCEMENT OF RETIREMENT	EFFECTIVE DATE OF RETIRMENT
Benedict, Charles	New York, E	5/26/97	7/20/97
Brown, Addison	New York, S	7/1/01	9/3/01
Baker, John	Indiana	11/8/02	12/18/02
Hallett, Moses	Colorado	4/7/06	5/1/06
Lockren, Wm.	Minnesota	4/3/08	7/11/08
Saunders, Eugene	Louisiana, E.	1/8/09	2/8/09
Dallas, George	Third Circuit	3/15/09	5/24/09

NAME	COURT	ANNOUNCEMENT OF RETIREMENT	EFFECTIVE DATE OF RETIREMENT
Reid, Silas	Alaska	6/14/09	7/1/09
Cooley, Alford	New Mexico	6/6/10	7/10/10
Brawley, Wm.	S. Carolina	4/18/11	6/14/11
Donworth, George	Washington	1/24/12	7/8/12
Locke, James	Florida, So.	7/9/12	9/2/12
Peele, Stanton	Court of Claims	1/2/13	2/11/13
Stuart, Thomas	Hawaii	8/8/16	11/23/16
Whitney, Wm.	Hawaii	1/25/17	3/19/17
Shepherd, Seth	D.C. Ct. Appeals	5/1/17	9/30/17
Dyer, David	Missouri, E.	5/15/19	11/3/19
Batts, Robert	Fifth Circuit	8/22/19	4/9/20
Davis, John	New Jersey	6/5/20	6/12/20
Riner, John	Wyoming	10/13/21	10/31/21
Rudkin, Frank	Washington	1/17/23	1/18/23
Anderson, Albert	Seventh Circuit	10/31/29	11/6/29

Appendix III

Examples in Vol. I of the Journal of the Executive Proceedings of the Senate, of Senatorial Confirmations in Anticipation of a Vacancy.

I. Nominations vice an incumbent who is being elevated at the same time.

December 21, 1796, p. 216.[1/]

I nominate the following persons to fill the offices annexed to their names, respectively, which became vacant during the recess of the Senate:

* * *

Jonathan Jackson, of Massachusetts, to be Supervisor for the district of Massachusetts, vice Nathaniel Gorham, deceased.

John Brooks, of Massachusetts, to be Inspector of Survey No. 2, in the district of Massachusetts, vice Jonathan Jackson, appointed Supervisor.

Samuel Bradford, of Massachusetts, to be Marshal for the district of Massachusetts, vice John Brooks, appointed Inspector of Survey No. 2, in that district.

* * *

Confirmed December 22, 1796, p. 217. A number of similar nominations and confirmations took place in February, 1801, in connection with the staffing of the circuit courts. pp. 381-385.

1/ The page numbers refer to the pages of Volume I of the Journal of the Executive Proceedings of the Senate.

II. Nominations vice incumbents who desire to be relieved of their duties.

May 19, 1796, p. 209

I nominate Rufus King, of New York, to be Minister Plenipotentiary of the United States at the Court of Great Britain, in the room of Thomas Pinckney, who desires to be recalled.

David Humphreys, of Connecticut, to be the Minister Plenipotentiary of the United States at the Court of Spain; William Short, the resident Minister to that Court having desired to be recalled.

Confirmed, May 20, 1796, p. 209.

III. Nominations to fill terms about to expire.

1. January 10, 1798, p. 258

I nominate the following persons to be Marshals of the United States;

John Hobby~~, for~~ the District of Maine;
Philip B. Bradley, for the district of Connecticut;
Thomas Lowry, for the district of New Jersey;
Samuel McDowell, Jr., for the district of Kentucky:
each for the term of four years, to commence on the twenty-eighth of January, current, when their present terms will expire.

Confirmed, January 12, 1798, p. 258.

2. December 9, 1799, p. 325

I nominate * * * David Mead Randolph the present Marshal of the District of Virginia, for the term of four years, to commence on the 15th instant when his existing commission will expire.

Confirmed, December 6, 1799, p. 326.

3. February 4, 1803, p. 441

I nominate * * * William Henry Harrison, to be Governor of the Indiana Territory from the 13th day of May next, when his present commission as Governor will expire.

Confirmed February 8, 1803, p. 442.

IV. Nominations to fill vacancy which will be caused by a resignation on a future day certain.

May 7, 1800, p. 352

I nominate the Honorable John Marshall, Esq. of Virginia, to be Secretary of the Department of War, in the place of the Honorable James McHenry, Esq., who has requested that he may be permitted to resign, and that his resignation be accepted to take place on the first day of June next.

May 12, 1800, p. 353

I nominate the Honorable John Marshall, Esq., of Virginia, to be Secretary of State, in place of the Honorable Timothy Pickering, Esq. removed.

The Honorable Samuel Dexter, Esq. of Massachusetts, to be Secretary of the Department of War, in the place of the Honorable John Marshall, nominated for promotion to the Office of State.

Confirmed, May 13, 1800, p. 354

V. Nomination to fill office, the incumbent of which is to be superseded.

December 23, 1799, p. 329

I nominate Ambrose Gordon, of Georgia, to be Marshal of the district of Georgia, in the place of Oliver Bowen, to be superseded.

Confirmed, December 24, 1799, pp. 329-330.

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NOMINATIONS OF SUPREME COURT JUSTICES IN ELECTION YEARS*

	Total Nominations	Confirmed	Rejected	Withdrawn, Postponed, or Not Acted Upon
Before election in election year (See Table I)	15	11	1	3
Between election and inauguration of different President (See Table II)	~~14~~ 15	9**	1	5
Nominations other than above categories	96	85***	7	4
Totals:	126	105	9	12

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* Includes the period between January 1 of an election year and the inauguration date of the following year.

** Includes Stanley Matthews, the relevant dates of whose nomination and confirmation are as follows:

Nominated--January 26, 1881
Not acted upon when Senate adjourned March 3, 1881
Resubmitted--March 14, 1881
Confirmed--December 20, 1881

***Includes these special cases:
1) William Paterson
Nominated--February 27, 1793
Nomination recalled by President--Feb. 28, 1793
Resubmitted--March 4, 1793
Confirmed--March 4, 1793

2) Roger B. Taney
   Nominated as Associate Judge--Jan. 15, 1835
   Postponed--March 3, 1835
   Nominated as Chief Justice--Dec. 28, 1835
   Confirmed--March 15, 1836
3) Edwin M. Stanton
   Nominated--Dec. 20, 1869
   Confirmed--Same day
   Died--Dec. 24, 1896--without ever taking seat on Court

I. Nominations in Election Year: Before Election

Name of Nominee	Date of Nomination	Disposition of Nomination	Nominating President and Party	Succeeding President and Party
William Cushing	Jan. 26, 1796*	Confirmed Jan. 27, 1796 Declined Feb. 2, 1796	Washington Federalist	Adams Federalist
Samuel Chase	Jan. 26, 1796	Confirmed Jan. 27, 1796	Washington Federalist	Adams Federalist
Oliver Ellsworth	Mar. 3, 1796	Confirmed Mar. 4, 1796	Washington Federalist	Adams Federalist
William Johnson	Mar. 22, 1804	Confirmed Mar. 24, 1804	Jefferson Dem.-Repub.	Jefferson Dem.-Repub.
John Spencer	Jan. 8, 1844	Rejected Jan. 31, 1844	Tyler Democrat	Polk Democrat
Reuben Walworth	Mar. 13, 1844	Postponed Jan. 15, 1844 Withdrawn June 17, 1844	Tyler Democrat	Polk Democrat
Edward King	June 5, 1844	Postponed June 15, 1844	Tyler Democrat	Polk Democrat

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* Nominated as Chief Justice; had been Associate Justice since 1789.

Name of Nominee	Date of Nomination	Disposition of Nomination	Nominating President and Party	Succeeding President and Party
Edward A. Bradford	Aug. 16, 1852	Not acted upon	Fillmore Whig	Pierce Democrat
Melville Fuller	Apr. 30, 1888	Confirmed July 20, 1888	Cleveland Democrat	Harrison Republican
George Shiras	July 19, 1892	Confirmed July 26, 1892	B. Harrison Republican	Cleveland Democrat
Mahlon Pitney	Feb. 19, 1912	Confirmed Mar. 13, 1912	Taft Republican	Wilson Democrat
Louis D. Brandeis	Jan. 28, 1916	Confirmed June 1, 1916	Wilson Democrat	Wilson Democrat
John H. Clarke	July 14, 1916	Confirmed July 24, 1916	Wilson Democrat	Wilson Democrat
Benjamin N. Cardozo	Feb. 15, 1932	Confirmed Feb. 24, 1932	Hoover Republican	Roosevelt Democrat
William Brennan	Oct. 15, 1956 Recess appt. Jan. 14, 1957 (after election)	Confirmed Mar. 19, 1957	Eisenhower Republican	Eisenhower Republican

II. Nominations Between Election and Inauguration of Different President

Name of Nominee	Date of Nomination	Disposition of Nomination	Nominating President and Party	Succeeding President and Party
John Jay	Dec. 18, 1800	Confirmed Dec. 19, 1800 Declined Jan. 2, 1801	Adams Federalist	Jefferson Dem.-Repub.
John Marshall	Jan. 20, 1801	Confirmed Jan. 27, 1801	Adams Federalist	Jefferson Dem.-Repub.
John J. Crittenden	Dec. 17, 1828	Postponed Feb. 12, 1829	J.Q. Adams Nat.-Repub.	Jackson Democrat
William Smith	Mar. 3, 1837	Confirmed Mar. 8, 1837 Declined later in same month	Jackson Democrat	Van Buren Democrat
John Catron	Mar. 3, 1837	Confirmed Mar. 8, 1837	Jackson Democrat	Van Buren Democrat
Peter V. Daniel	Feb. 26, 1841	Confirmed Mar. 2, 1841	Van Buren Democrat	Harrison Whig
Edward King	Dec. 4, 1844	Postponed Jan. 23, 1845 Withdrawn Feb. 7, 1845	Tyler Democrat	Polk Democrat

Name of Nominee	Date of Nomination	Disposition of Nomination	Nominating President and Party	Succeeding President and Party
Samuel Nelson	Feb. 4, 1845	Confirmed Feb. 14, 1845	Tyler Democrat	Polk Democrat
John Read	Feb. 7, 1845	Not acted upon	Tyler Democrat	Polk Democrat
George Badger	Jan. 10, 1853	Postponed Feb. 11, 1853	Fillmore Whig	Pierce Democrat
William Micou	Feb. 24, 1853	Not acted upon	Fillmore Whig	Pierce Democrat
Jeremiah Black	Feb. 5, 1861	Rejected Feb. 21, 1861	Buchanan Democrat	Lincoln Republican
William B. Woods	Dec. 15, 1880	Confirmed Dec. 21, 1880	Hayes Republican	Garfield Republican
Stanley Matthews	Jan. 26, 1881	Not acted upon	Hayes Republican	Garfield Republican
	Resubmitted Mar. 14, 1881	Confirmed Dec. 20, 1881	Garfield Republican	Arthur Republican (Sept. 20, 1881)
Howell E. Jackson	Feb. 2, 1893	Confirmed Feb. 18, 1893	B. Harrison Republican	Cleveland Democrat

Senator LEAHY. I would note, as I said earlier on this morning just so we can save time because I do want to get to Mr. Babcock today because I think the next hearing date is right after the recess and if we do not finish by 12:00, I would hate to have to have Mr. Babcock come all the way back—but as I stated earlier——

Senator THURMOND. Mr. Chairman, that is all I have.

Senator LEAHY. As I stated earlier, I absolutely agree with you on the law, Senator Thurmond. I noted earlier that that is the law. Nobody questions that that is the law. My only concern was that we had two nominations here today, one yours, Mr. Tilley, in which a vacancy does not yet occur, and Mr. McGregor's where the vacancy occurred for years before the Justice Department even sent a name up.

My concern was that eagerness to get yours forward before a vacancy occurs as contrasted to one where the Justice Department is willing to sit on their hands for a couple of years and allow a vacancy to build in Pennsylvania.

With respect to the vacancy, Judge Ward can do as he wants. I mean, that is up to him, and there is no question, as I stated earlier, and the law that Senator Thurmond has discussed confirms what I said earlier that you can hold these hearings before there is a vacancy.

I just mention that it is interesting the way the Justice Department works, and you do not even have to respond to that, sir. I will not put you in that position. Thank you very much for being here.

Mr. TILLEY. Thank you very much. I appreciate it.

Senator THURMOND. Thank you very much. I think you will make an excellent judge and I wish you a happy tenure on the bench.

Mr. TILLEY. Thank you very much, Senator. I thank the committee for this hearing.

Senator LEAHY. Senator Thurmond especially feels that because you are one of the few nominees that has been here where he does not require a simultaneous translation. You can both speak in the regional tone, and appeal to the rest of us who do not have those advantages.

Senator THURMOND. Which tone characterizes patriotism and love of country. [Laughter.]

Senator LEAHY. I would hope any American from any part of the country. I am sure that the Senator would agree with me on that.

[Letter from Judge Ward follows:]

United States District Court
Middle District of North Carolina
Suite 246, Federal Building & U. S. Courthouse
Winston-Salem, North Carolina 27101

Chambers of
Hiram H. Ward
Chief Judge

August 17, 1988

The President
The White House
Washington, DC 20500

Dear Mr. President:

On August 24, 1987, I wrote you of my intention and desire to retire from regular active service as a United States District Judge under the provisions of 28 U.S.C. § 371(b), with the election to retain my office and assume the status of Senior United States District Judge on April 29, 1988, or as soon thereafter as my successor was appointed and qualified.

In the spring of this year you nominated N. Carlton Tilley, Jr. to succeed me. Since then the confirmation process has proceeded rather haltingly. Mr. Tilley was finally given a hearing before the Senate Judiciary Subcommittee on August 9, 1988, but further action on his nomination is not expected until the Senate reconvenes following the Labor Day recess.

Mr. Tilley has broad bipartisan support because of his experience, ability and temperament. I have been advised that Senator Sanford has joined Senator Helms in urging speedy confirmation of Mr. Tilley's nomination. Since both Senators from North Carolina, on opposite sides of the aisle, are committed to Mr. Tilley's confirmation, I know of no legitimate reason that this should not occur after the Senate reconvenes in September.

My friend and colleague, Judge Richard C. Erwin, will automatically become Chief Judge of this District under the provisions of 28 U.S.C. § 136(a)(1)(A) if I take Senior Status before his 65th birthday on August 23, 1988. Judge Erwin is eminently well qualified for this position and has approximately four more years to serve before he is eligible for retirement. Therefore, based upon assurances that both Senator Helms and Senator Sanford, acting in good faith, are urging a speedy confirmation of my successor, I am electing to take Senior Status as of the close of business on Friday, August 19, 1988.

My reason for not wanting to take Senior Status until my successor was qualified was based upon the fact that the heavy work load of this district cannot effectively be handled by only two active judges. In addition to having a heavy and complex civil docket, this District has one of the highest criminal case loads per judge in the nation. I will, therefore, as a Senior Judge continue to carry my current case load until the Senate has had an opportunity to act upon Mr. Tilley's confirmation when it reconvenes in September.

With the dedicated assistance of my colleagues, I have devoted sixteen years of my life to disposing of the backlog of cases and working towards the present current status of cases that this Court enjoys. I assure you that as a Senior Judge I will continue to assist as long as my health permits and that this Court will be in good hands under the leadership of Judge Erwin.

With kindest personal regards and best wishes, I am

Sincerely,

Hiram H. Ward

Hiram H. Ward

HHW/mn

CC: The Chief Justice
The Attorney General
The Senate Judiciary Committee ✓
The Honorable Jesse Helms
The Honorable Terry Sanford
Chief Judge, United States Court of Appeals for the Fourth Circuit
Director, Administrative Office of the United States Courts
Judges, M.D.N.C.
Magistrates, M.D.N.C.
Clerk of Court, M.D.N.C.

Senator **Leahy**. Judge Babcock, would you raise your right hand? Do you solemnly swear the testimony you shall give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Babcock**. I do.

Senator **Leahy**. Judge Babcock, you have sat here long enough waiting, and please feel free, if you wish to make any kind of opening statement, to do so.

TESTIMONY OF HON. LEWIS T. BABCOCK, BOULDER, CO, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF COLORADO

Judge **Babcock**. Only that it is a high honor and privilege to be here before you today to hopefully answer any questions you may have.

Senator **Leahy**. Thank you.

I understand on the court of appeals, you have authored over 500 opinions in the 5 years you have been on that court?

Judge **Babcock**. Approximately. Of those, 40 percent or so met our local rule of criteria for publication.

Senator **Leahy**. You work very hard.

Judge **Babcock**. Yes, sir.

Senator **Leahy**. Do your wife and daughter ever get to see you? I will not even ask them that, but I can see some knowledgeable smiles behind you. You have got a staggering workload, though, in the district court in Colorado. You do not have any illusions about how much of a backlog has built up there, do you?

Judge **Babcock**. None whatever, sir. I understand that.

Senator **Leahy**. Now, one of the things of the criminal practice that is a lot different is you do not have any—or let me ask you this. There is no question in your mind, though, that the criminal practice will be considerably different in the Federal court than what it was when you first started practicing law in the State courts of Colorado?

Judge **Babcock**. That is exactly correct. That is one of the things I have noticed over the 20 years that I've been engaged in this profession both in State and Federal court.

Senator **Leahy**. I mean, you accept that as a reality that——

Judge **Babcock**. Absolutely.

Senator **Leahy** [continuing]. There is no going back to the good, old days of the State court practice?

Judge **Babcock**. That is correct.

Senator **Leahy**. We had extensive questions and they were all in your questionnaire. You have answered those and those, of course, are part of the record.

I would yield to Senator Thurmond.

Senator **Thurmond**. Thank you, Mr. Chairman.

I understand Senator Heinz is here and would like to make a statement.

Senator **Leahy**. On Mr. McGregor.

Senator **Thurmond**. I presume it is on behalf of Mr. McGregor.

Senator **Leahy**. Yes. I would also note for Senator Heinz' benefit that those lights are broken. That is not a vote on.

Senator THURMOND. If you want to come around, Senator, and make your statement?

Senator LEAHY. Did you want to ask any questions of Mr. Babcock so we can let him sit down?

Senator THURMOND. Oh, do you want me to finish?

Senator LEAHY. Yes.

Senator THURMOND. Okay. If you will have a seat, I will just have a couple of questions for Judge Babcock.

Judge Babcock, there is frequently a conflict between the deeply-felt constitutional views of a Federal judge and the constraints of judicial precedent. How do you resolve the tension between personal jurisprudence and precedent?

Judge BABCOCK. Well, Senator Thurmond, I think our system should be geared to accommodate change within a framework of institutional stability, and one of the institutional stabilizing factors is the doctrine of stare decisis; that is, to follow precedent.

Each case is unique in that each set of individuals who bring a case to the court for resolution are unique individuals, so that each case advances the development of the law.

But I think it was John Marshall who said, and I'll paraphrase it—I can't quote him exactly, but he said that the court should not be a vehicle for the imposition of the judge's individual will in a case, and I agree with that. I follow precedent as closely as I understand it.

Senator THURMOND. Judge Babcock, Thomas Jefferson remarked shortly after the ratification of the Constitution, and these are his words, "Our Nation's particular security is the possession of a written Constitution. Let us not make it a blank paper by construction."

Judge Babcock, what do you think he meant by that warning, "let us not make it a blank paper by construction?"

Judge BABCOCK. I think he meant, Senator, at least as I understand his words, that the fountainhead of our authority as judges, the fountainhead of your authority as legislators, the fountainhead of the President's authority as an executive, flows from the Constitution.

The Constitution is the reflection of the expression of the people's will. It begins "We the People," and it, as a reflection of the people's will, should be the initial starting point for the resolution of any dispute that may fall under it.

Senator THURMOND. Do you think he probably meant that the Constitution should be construed strictly? The words are written very plainly, and rather than making strained constructions, just follow the Constitution like it is written?

Judge BABCOCK. I think that is correct.

Senator THURMOND. Thank you very much.

Judge BABCOCK. Thank you, Senator.

Senator THURMOND. I wish you well on the bench and hope you enjoy your service.

Judge BABCOCK. Thank you, sir.

Senator LEAHY. Thank you very much, sir. I appreciate your being here.

Judge BABCOCK. Thank you, Mr. Chairman.

Senator LEAHY. Thank you.

Senator Heinz, we welcome you back to Washington, and in the 3 minutes remaining in the hearing, is there anything you would like to say to us?

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, I can take a hint is the first thing I will say to you. [Laughter.]

And, secondly, I very——

Senator LEAHY. I apologize for that. It is just that we announced at the beginning that we were going to have to finish at 12:00 or come back later today.

Senator HEINZ. Mr. Chairman, I understand perfectly, and I want to thank you, particularly, as the acting Chairman of the committee for scheduling not only Jim McGregor's hearing before you today, but for allowing me to appear, in a sense, after the fact, but while the record is still open, on behalf of Jim McGregor.

I know you have had extensive introductions of him before from my colleagues, particularly my House colleagues who were able to attend. Senator Specter, as you know, is not able to be here. He, too, I know, joins in presenting Jim to you.

Senator LEAHY. And I should note also for the record, in all seriousness, that both you and Senator Specter urged me and the committee to hold these hearings. As always, I wanted to be able to accommodate both of you. I say that seriously and as a matter of respect to both of you.

Senator HEINZ. Well, thank you. We have not been reticent about making such a request, it is true, and we thank you for responding to it so positively.

I am going to ask unanimous consent that my full statement be in the record. I just wanted to point out two things about Jim McGregor that may have escaped notice. I do not know if you noticed, Mr. Chairman, that in his résumé he served from 1978 to 1983 as a member of what was called the National Criminal Justice Task Force of the Urban Consortium.

The Urban Consortium consisted of corrections officials, police chiefs and prosecutors, all working to identify problems in the criminal justice system and to formulate solutions to those problems. I believe they were some help to us and the House committee in the criminal code reform.

Jim McGregor was the only judge in the United States to serve as a member of that consortium, and it is a mark, I think, of the distinction with which he has been held by his colleagues and by the corrections community in general that he was so selected. So I make that a special point of emphasis.

My second point would be this. It is important not only for a prospective member of the court to know the law and to have a record in dispensing justice, but I think, and I suspect many here would agree, that it is also important for such a person to have a very broad view of the corrections process.

Jim McGregor believes that the corrections process is, in a sense, too important just to be left to the courts and to the prosecutors and to the people who run our prisons and jails. He believes that a private citizen can have an impact and, indeed, has responsibilities to make an impact on our corrections system.

As a case in point, he became a founder of Consilium, Incorporated, which is a non-profit social service umbrella agency which aids in the resocialization and rehabilitation of a specific prison population—primarily veterans, the infirm, the elderly.

He has served for 9 years on their board of directors and has been of inestimable aid, counsel, and advice. He is thereby someone who I think takes his responsibilities to the legal system above and beyond the call of duty.

It is a privilege and pleasure to present to you a man I have known for the better part of 24 years and who I have a tremendously high regard for, Jim McGregor.

[The statement of Senator Heinz follows:]

Statement of Senator John Heinz
Before Senate Judiciary Committee
Nomination of Judge James MacGregor
U.S. District Court for Western District of Pennsylvania
August 9, 1988

Mr. Chairman, it is a privilege and a pleasure to join with my colleague Senator Specter to introduce to the Committee Judge James MacGregor, the President's nominee to fill one of two vacancies that have existed since 1985 on the U.S. District Court for the Western District of Pennsylvania.

Jim has served on the Allegheny County Court of Common Pleas since 1974 when he was appointed by former Governor Milton Shapp. He was elected the following year to serve a full ten year term, and in 1985 he was retained for a second ten year term with almost 80% of the vote. During his 14 year tenure on the Court of Common Pleas, Jim has served in the Family, Civil and Criminal Divisions.

Mr. Chairman, I am proud to note that Jim was the only judge in the United States to have served from 1978 to 1983 as a member of the National Criminal Justice Task Force of the Urban Consortium. The Consortium, which consisted of correction officials, police chiefs and prosecutors, worked to identify existing problems in the criminal justice system and attempted to formulate solutions to those problems.

Jim has been an active member of the Criminal Law Section of the Allegheny County Bar Association which meets monthly to improve all facets of criminal justice. This group consists of prosecuting and defense attorneys and the judges of the Criminal Division of the Court of Common Pleas.

Prior to earning his Juris Doctor degree from the University of Pittsburgh School of Law, Jim served in the U.S. Army for three years and was honorably discharged. As an attorney, Jim's legal background was primarily in real estate and family law. In addition, he has served as the Legal Counsel to the Minority Leader of the Pennsylvania House of Representatives and as a Solicitor to the Allegheny County Controller.

Mr. Chairman, I want to state for the record that Judge MacGregor was selected by a bi-partisan merit selection commission established by Senator Specter and me. The Federal Judicial Nominating Commission of Pennsylvania actively sought qualified candidates to this court and recommended Jim as being among the very best for appointment to the federal judiciary.

Not only does Jim possess the legal qualifications, experience , and political temperament required for appointment as a U.S. District Judge, he has demonstrated his commitment to helping those in his community. As an example, Jim is a founding member of Consilium, Inc. and has served for nine years on its Board of Directors. This non-profit organization is a social service umbrella agency which aids in the resocialization and rehabilitation of a specific prison population -- primarily, the elderly, the infirm, and veterans. Jim has clearly taken his responsibilities with the Court of Common Pleas and gone beyond the call of duty.

Mr. Chairman, having known Jim and his family personally for so many years, I know he is more than capable of assuming the responsibilities for which the President has nominated him, and I urge the Committee to act most expeditiously on his nomination to the U.S. District Court of Appeals for the Western District of Pennsylvania.

Senator LEAHY. Thank you very much, and I know that you had to rearrange a number of things to be here and I appreciate very much the fact that you have taken the time, Senator Heinz.

And, of course, Senator Specter, who has talked to me before, too, on that is a member of this committee.

Senator THURMOND. We are glad to have you with us, Senator.

Senator HEINZ. Senator Thurmond, thank you and Senator Leahy very much.

Senator THURMOND. And the nominee is lucky to have you by his side. Your two Republican Senators from Pennsylvania are held in high esteem around this place.

Senator LEAHY. The hour of twelve having——

Senator THURMOND. Mr. Chairman, could I mention this? Senator D'Amato asked me to specifically ask you to please put Howard Levitt on the agenda tomorrow. I might say that there are eleven judges who have had hearings, and we would request you to place all of them on the agenda for tomorrow.

Senator LEAHY. Well, I, of course, as the Senator knows, have absolutely no control over the agenda. I am not the chairman of the committee.

Thank you very much.

[Whereupon, at 12:02 p.m., the committee was adjourned.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

James Russell McGregor, Senior

2. Address: List current place of residence and office address(es).

1420 Walnut Street, Edgewood, Pittsburgh, PA 15218
513 Allegheny County Courthouse, Pittsburgh, PA 15219

3. Date and place of birth.

July 13, 1929; Kittanning, PA (Armstrong County)

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Married. Marguerite Anne Ulrich
Occupation: Vice President - Community Affairs, Equibank, 2 Oliver Plaza, Pittsburgh, PA. 15222

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Washington & Jefferson College, Sept. 1947 to June 1951, Bachelor of Arts;
University of Pittsburgh, School of Law, Sept. 1954 to June 1957; Bachelor of Laws converted to Juris Doctor
University of Pittsburgh, Graduate School of Business, Sept. 1957-Oct. 1957 - did not continue because of my father's death.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Employment

Mar. '74-present Commonwealth of Pennsylvania, 513 Courthouse, Pittsburgh, PA 15219 - Judge

Aug. '73-Mar.'74 Baskin, Boreman, Wilner, Sachs, Gondelman & Craig, 10th Floor, Frick Bldg., Pittsburgh, PA 15219 (now on 29th Fl. Mellon Bank Center, Pittsburgh, PA 15219) - Attorney

May '67-Aug.'73 McGregor, Dillman, Sheerer & Schuchert, 36th Fl. Mellon Bank Bldg., William Penn Way, Pittsburgh, PA 15219 (from May '72-Aug.'73) also 2000 Lawyers Bldg., Pittsburgh, PA 15219 (from May '67-May '72) - Attorney

Jan.'69-Sept.'70 Solicitor to Allegheny County Controller, 104 Courthouse, Pittsburgh, PA 15219 (Part-time)

June '65-May '67 Sole practitioner, 2141 Ardmore Blvd., Forest Hills, PA 15221 also 2209 Ardmore Blvd., Forest Hills, PA 15221

Dec.'65-Jan.'67 Legal Counsel to the Minority Leader of House of Representatives, Harrisburg, PA (Part-time)

Dec.'65-Nov.'66 Legislative Campaign Committee-Republican State Committee, 112 State St., Harrisburg, PA 17101, Director (Part-time)

May 1,'64-Nov.30,'64 Office of the District Attorney of Allegheny County, PA, 401 Courthouse, Pittsburgh, PA 15219 (Part-time)

1958-1964 Taught beginning and/or advanced Russian-Adult Education YWCA, Wilkinsburg, Mt. Lebanon High School; Fox Chapel School District, West Mifflin School District

Nov.'57-summer'65 Ginn & Company, at that time their address was 72 Fifth Ave., New York New York

Aug.'56-Nov.'57 Westinghouse Electric Corp., Pittsburgh, PA

Summer of 1955 Anthony F. Cost, Cost Brothers, Yost Boulevard, Pittsburgh, PA, kitchen appliances and cabinet salesperson

Summer of 1955 Fuller Brush Company, Salesperson

July and Aug. 1954 Southern California Gas Company in Los Angeles, California - Ditch digger

1954-1968 Officiated high school and college basketball games (approximately 800)

Summer of 1950 the Reuben H. Donnelly Company, distributing Tide Soap box samples to homes throughout Western Pennsylvania, foreman

Summers of 1948-1949 Cost Brothers (now at Yost Blvd., Forest Hills, PA 15221, a laborer-assistant to Anthony F. Cost as a plumber's helper

Officer, Director, Partner or Proprietor

1968-1984 General Partner - Bryn Mawr Properties,

1972-1974 Director - Forest Park Realty Co.
1973-1974 Director - Welcome Aboard Travel Agency
1978-1983 Director - Consilium

1965-1985 Board of Governors - Amen Corner (1976-77, President)

Executive Committee - Boy Scouts of America, East Valley Area Council

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial numbers and type of discharge received.

July 13, 1951 - June 16, 1954; U. S. Army - Army Security Agency; Corporal RA 134 06 353. Honorably discharged.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Washington & Jefferson College 1947-1951 - Academic and athletic scholarships
Kera, honorary fraternity - Washington & Jefferson College (1948-1949)
National Vice President, American Law Student Association, one of three in United States cited for outstanding service in 1957
Magister (President) - Phi Delta Phi Legal Fraternity, University of Pittsburgh School of Law (1956-1957)
President, Washington & Jefferson College Alumni Association of Allegheny County (1964-1965)
Human Rights Award, Allegheny County Young Black Republican Council, October, 1977
Eagle Scout, Order of the Arrow -1945
American Legion Award, Forest Hills Junior High School - 1943

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Member, Allegheny County, Pennsylvania and American Bar Associations;
Member, American Judicature Society
Former Member, Executive Committee (Elected-1984) Pennsylvania Conference of State Trial Judges
Member, Allegheny County Prison Board

Faculty member, Pennsylvania College of the Judiciary
  Panel Moderator - Drunk Driving
  Panel Moderator - New Discovery Rules
  Panel Moderator - Judicial Retention Elections
Member, The Law Club of Pittsburgh
Member , National Criminal Justice Task Force - Urban Consortium - 1978-1983

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Active in lobbying:

Oakmont Country Club - 1975 to date

Other organizations:

East Valley Area Council - Boy Scouts of America
Phi Gamma Delta - Social Fraternity
Phi Delta Phi - Legal Fraternity
Edgewood Country Club - 1960-1978
Boy Scouts of America-Executive Committee-East Valley Council
American Legion, Former Member
Benevolent & Protective Order of Elks, Former Member
Pittsburgh Press Club, Former Member
Amen Corner
Leukemia Society of Western Pennsylvania - Former Board Member
Various Masonic Bodies, Syria Temple, Jesters

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Court of Common Pleas of Allegheny County, Nov. 27, 1964
Superior Court of Pennsylvania, April 15, 1965
Supreme Court of Pennsylvania, May 24, 1965
U. S. District Court for the Western District of Pennsylvania, Dec. 10, 1964
U. S. Court of Appeals for the Third Circuit, March 26, 1973
Supreme Court of the United States, May 21, 1973
(No lapses in membership in any of the above)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published materials you have written or edited. Please supply one copy of all published material not readily available to the

Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None other than trial court opinions.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. 7/13/87

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed and a description of the jurisdiction of each such court.

Judge, Court of Common Pleas, Allegheny County, Pennsylvania, appointed March, 1974, elected to a ten year term, November 1975. The Court of Common Pleas of Allegheny County is a unified judicial system and constitutes the trial court for all Civil, Orphans' Court, Family and Criminal matters. Retained for a ten year term in 1985 with almost 80% of the vote - I have served in the Family, Civil and Criminal Divisions.

15. Citations: If you are or have been a judge, provide citations for:

(1) the ten most significant opinions you have written;

Commonwealth v. Clifford Futch,
492 Pa. 359; 424 A.2d 1231
Commonwealth v. Charles Bonasorte,
______Pa. Super.______; 486 A.2d 1361
Commonwealth v. Charles Redshaw,
______Pa. Super.______; 422 A.2d 680
Commonwealth v. Donna Lapia,
311 Pa. Super. 264; 457 A.2d 877
Commonwealth v. Earnest Easley,
483 Pa. 337, 396 A.2d 1198
Commonwealth v. Orlene Piccini,
Not reported yet
Commonwealth v. Marilyn A. Lewis,
______Pa. Super.______; 453 A.2d 982
Commonwealth v. Fred Wynn,
______Pa. Super.______; 512 A.2d 1292
Commonwealth v. Kevin Tirpak,
______Pa. Super.______; 491 A.2d 922
Commonwealth v. James Rini III,
______Pa. Super.______; 495 A.2d 614
Commonwealth v. Vera Mae Drew,
______Pa.______; 459 A.2d 318
Commonwealth v. Earl Bresnan,

______Pa. Super.______; 512 A.2d 1288
Commonwealth v. Anthony LaRocca,
______Pa. Super.______; 509 A.2d 1321
Commonwealth v. Francis R. Ferri,
______Pa. Super.______; 509 A.2d 1321

(2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings

COMMONWEALTH V. ROBERT P. STEDING, 391 A.2d 989, 480 Pa. 485 (1978)

The Superior Court reversed the granting of the suppression by this Court and the Supreme Court reversed the Superior Court stating that the conclusion of the trial court "was factually supported by the record and was legally sound." Therefore the tangible items and the statement of the Defendant were suppressed and the case remanded for further proceedings. On Motion of the District Attorney, Judge Dauer nolle prossed the case. See attached case summary.

COMMONWEALTH V. LYONS, 390 A.2d 752 (1978)

Decision -- Suppression reversed and remanded

Judge Hoffman filed a dissent stating that he would not reverse the trial court's suppression order at this time. He believed that the Defendant raised novel questions of State Constitutional law.

Further the Superior Court in issuing its Opinion reversing the trial court specifically stated,

"It should be noted that the suppression court did not have the benefit of the United States Supreme Court's recent decision in Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, (1977) when it made its decision in this case. In Mimms the United States Supreme Court reversed the Pennsylvania Supreme Court and held that a traffic violator, properly detained at roadside, may be ordered from his car during the necessary exchange of information and credentials pursuant to the stop...." At page 753 See attached case summary.

COMMONWEALTH V. MANLEY BANKS, 378 A.2d 936 (1977)

Decision -- Reversed and remanded for trial. Judges Spaeth and Hoffman dissent.

The appellate court decided the case as a court de novo. (See dissent at p. 941). Further, Judge Spaeth stated in his dissenting Opinion that, "It would have been good practice for the hearing judge to have made specific findings of fact; and certainly he should have given us the benefit of a written opinion."

Contrary to this statement by the appellate court, the hearing judge did file written Findings and Conclusions with the Clerk of Courts on February 13, 1976, which are in the case papers. More importantly, the hearing judge did file a comprehensive Opinion on October 8, 1976 with the Clerk of Courts which for some unexplained reason is not in the court case papers but is in the Judge's case papers.

Had the appellate court had the benefit of the hearing court's findings of facts and conclusions of law, it would have had to find a clear abuse of discretion on the part of the lower court. See attached case summary.

COMMONWEALTH V. CARMELA McCARTHY, 390 A.2d 236, 257 Pa. Super. 42 (1978)

Decision -- The Superior Court reversed and remanded the suppression of the trial court, basing its Opinion on a case it decided April 28, 1978, 2 years after the trial court entered its Suppression Order.

Defendant then appealed to the Supreme Court of Pennsylvania, 40 March Term 1979 and Allocatur Docket No. 1681. The Supreme Court modified the mandate of the Superior Court by remanding the case to the trial court for determination of the other suppression grounds advanced by the Defendant.

On remand, the Commonwealth and the Defendant entered into a plea bargain which was accepted by the Court. Defendant plead guilty and received one year probation and the imposition of costs. See attached case summary.

COMMONWEALTH V. VINCENT N. BURKLEY, 297 Pa. Super 400, 443 A.2d 1182

Defendant was charged with possession of a prohibited offensive weapon (1 count) and possession of a weapon or implement for escape (1 count). Defendant was convicted of both counts by a jury. Defendant filed post-trial motions which were denied. The appellate court affirmed the conviction at the first count and reversed the conviction on the second count.

The trial court Opinion stated:

"The evidence presented is that the Defendant had for some time been the sole occupant of his cell in which the mattress containing the weapon was located. In Commonwealth v. Crowley, 393 A.2d 789, 259 Pa. Super, 204 (1978), where the evidence established that the inmate had for some time been the sole occupant of the cell and implements of escape were found under his bed, it was held to be sufficient to establish a conviction for having an implement for escape."

The appellate court however, stated at length that a showing of "control only" by a Defendant is insufficient to prove "possession". "The mere fact of appellant's residing in the cell is insufficient to raise the inference that he exercised the requisite intent to control the screwdriver when guards and other inmates had and experienced access to the cell. Commonwealth v. Fortune, 456 Pa. 365, 318 A.2d 327 (1974)" The Court accordingly reversed the conviction on that count and discharged Defendant therefor. The sentence remained unchanged. See attached case summary.

COMMONWEALTH V. FIELD, ______Pa. ______ 417 A.2d 160 (1980)

Appellant was charged with vehicular homicide and filed a pre-trial motion requesting dismissal on the grounds that said statute was unconstitutional. The trial court agreed and dismissed the case. The Commonwealth appealed, and the Pa. Supreme Court reversed and remanded for trial.

The trial court convicted Defendant and was reversed on appeal. The issue was whether the activities of the Defendant, an executive who was assigned to drive a tank rig during a Teamster's strike and whose locomotion was being directed and controlled by an on-duty sheriff, were within the ambit contemplated by the statute, i.e. whether the driver under the circumstances, could reasonably anticipate his conduct was likely to produce death.

See other summaries attached.[1]

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[1] Permission has been granted from West Publishing Co. to submit these summaries. (It is understood that this question requests information related to reported opinions, i.e. those that create precedent.

(3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Commonwealth v. Bonasorte, 486 A.2d 1361, 337 Pa. Super. 332 (1984)
Commonwealth v. Futch, 424 A.2d 1231, 492 Pa. 359 (1981)
Commonwealth v. Healey, 480 A.2d 313, 331 Pa. Super. 199 (1984)
Commonwealth v. Lapia, 457 A.2d 877, 311 Pa. Super. 367 (1983)
Commonwealth v. McCarthy, 390 A.2d 236 (1978)
In re Search Warrant Robert Gartley, Sr., 521 A.2d 422 (1987)
Commonwealth v. Field, ______Pa. ______417 A.2d 160 (1980)
Commonwealth v. Maurizio, 437 A.2d 1195 (1981)
Commonwealth v. Chacko, 459 A.2d 311 (1983)
Commonwealth v. Williams, 442 A.2d 314, 296 Pa. Super. 97 (1982)

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Legal Counsel to the Minority Leader of the House of Representatives, Harrisburg, PA - appointed - Dec. '65 to Jan. '67.

Solicitor to Allegheny County Controller, Pittsburgh, PA - appointed - Jan. '69 to Aug. 31, '70.

In 1970 I was a Republican nominee for the State Senate of Pennsylvania (44th District) and was defeated in the general election.

In 1973 I was a Republican nominee for the Court of Common Pleas of Allegheny County, Pennsylvania and I was defeated in the general election.

In 1983 I was a Republican nominee for the Superior Court of Pennsylvania and was defeated in the general election.

17. Legal Career: a. Describe chronologically your law practice and experience after graduation from law school including:

1) whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.

Not applicable.

2) whether you practiced alone, and if so, the addresses and the dates.

Yes. June '65 to May '67 - 2141 Ardmore Boulevard, Forest Hills, PA and subsequently 2209 Ardmore Boulevard, Forest Hills, PA

3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

May 1, '64 to Nov. 30, '64 - Office of the District Attorney of Allegheny County, 401 Courthouse, Pittsburgh, PA 15219 - Clerk

Dec. '65 to Jan. '67 - Pennsylvania House of Representatives, Harrisburg, Pa. - Legal Counsel to the Minority Leader

Jan. '69 to Sept. '70 - Allegheny County Controller - Solicitor, 104 Courthouse, Pittsburgh, PA 15219

May '67 to May '72 - McGregor, Dillman, Sheerer and Schuchert, 2000 Lawyers Building, Pittsburgh, PA 15219 - Partner

May '72 to Aug. '73 - McGregor, Dillman, Sheerer and Schuchert, 36th Floor, Mellon Bank Building, Pittburgh, PA 15219 - Partner

Aug. '73 to March '74 - Baskin, Boreman, Wilner, Sachs, Gondelman and Craig, 10th Floor, Frick Building, Pittsburgh, PA 15219 (Now on 29th Floor, Mellon Bank Center, Pittsburgh, PA 15219) - Associate by choice

b.1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

The general character of my law practice was family law although I devoted a substantial portion of my practice to real estate matters as well. Additionally, I did some personal injury, some estate, some tax and some criminal work. I have also done some administrative law work.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I represented many small corporations and one very large one and also represented one large partnership and many private citizens. My legal specialties were probably real estate and family law at the time I became a judge.

c.1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearance in court varied, describe each such variance, giving dates.

Occasionally

2. What percentage of these appeararances was in:

(a) federal courts - 2%
(b) state courts of record - 80%
(c) other courts - 18%

3. What percentage of your litigation was:

(a) civil - 95%
(b) criminal - 5%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel or associate counsel.

50 cases as sole counsel

5. What percentage of these trials was:

(a) jury - none
(b) non-jury - 100%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The general character of my law practice was basically real estate and family law matters.

I represented hundreds of buyers and sellers of real estate and was an approved real estate attorney by many title companies.

Additionally, I did some personal injury, some estate, some administrative law matters and some criminal matters.

My practice was essentially an office practice and, although all matters were of significance to my clients and myself, very few matters required litigation.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

The most significant legal activity that I pursued was the forming of Bryn Mawr Properties in 1970. We acquired and developed 193 apartment units on a five plus acre tract of land. I also resolved all access, zoning and utility problems associated therewith. The present market value of the property is approximately 7-1/2 million dollars.

I also represented at least 800 clients in the transfers of real estate. I would do some title work, prepare deed and mortgage documents, closing statements, record instruments and distribute the proceeds where appropriate.
I also represented hundreds of men and women who were severing their marriages as to support, custody, equitable distribution of property and the divorce itself.

Speech

"Future Direction of Criminal Justice" - Cambria County Law Day Speech, Cambria County Bar Association and friends - May 1, 1980; Masonic Lodge Meeting, September, 1987

Teaching

Faculty Member, Pennsylvania College of the Judiciary
  Panel Moderator - Drunk Driving
  Panel Moderator - New Discovery Rules
  Panel Moderator - Judicial Retention Elections

Professional Associations or Societies & Pro Bono Activities

I am the only judge in the United States to have served as a member of the National Criminal Justice Task Force of the Urban Consortium which consisted of correction officials, police chiefs, prosecutors and other persons from every facet of criminal justice in state systems, from 1978 to

1983. The charge of the Consortium was to identify existing problems in the criminal justice system and to attempt to identify the solution therefor and to create the methodology of resolution.

I have also served as a member of the Allegheny County Board of Prison Inspectors that has implemented U.S. District Judge Cohill's order (1979-July 1, 1981 and 1984 to present). The Board consists of various elected county officials including all of its Commissioners and various other community leaders who meet monthly to discuss, evaluate and resolve all matters affecting the prison population on a day-to-day basis, including but not limited to prisoner complaints alleging Eighth Amendment violations, and Occupational Safety and Health concerns of prison employees.

I was a founding member of and have served on the Board of Directors of Consilium, Inc. for nine years. This organization is a social service umbrella agency whose purpose has been to aid in the resocialization and rehabilitation of a specific prison population -- primarily, the elderly, the infirm and veterans. As a non-profit agency, funding has been received from foundations and state and federal agencies. Consilium, Inc. is also an activity of the Pennsylvania Council of Churches.

I have been an active member of the Criminal Law Section of the Allegheny County Bar Association. This section meets monthly to improve all facets of criminal justice. This group consists of prosecuting and defense lawyers and the judges of our Criminal Division of our Court.

I am also a member of the Allegheny County Bar Association Players that performs a rather elaborate spoof each year for a worthy charity (on a rotating basis), the Annual Bench-Bar Conference, the Pennsylvania Trial Judges annual meeting, the Three Rivers Art Festival and the annual meeting of the Pennsylvania Bar Association from time to time.

As a lawyer I served as a United Fund Chairman for two years and for many years I was on the Board of the Leukemia Society of Western Pennsylvania. The function of these groups were to raise money. When I became a judge I could no longer engage in fund raising activities.

For many years I have been on the Executive Board of the East Valley Area Council of the Boy Scouts of America. As a judge I organized the recruitment campaign for five consecutive years. Our campaigns were directed towards all young boys in a large portion of our county.

As a lawyer, my partners and I represented Catholic Social Services, pro bono, for many years on all adoptions. Our firm, McGregor, Dillman, Sheerer and Schuchert spent at least one hundred hours in the late 1960s and early 1970s in this service.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   From the Pennsylvania Judges Retirement Fund I will receive approximately $65,000 in cash (as of 4/1/88) and will be vested in the approximate amount of $302,000 (as of 4/1/88). Depending on which option my wife and I exercise, we will receive monthly payments from this fund.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I would recuse in any Equibank matter because of my wife's employment. I would recuse in any matter involving Bryn Mawr Properties, a limited partnership. I would recuse if the conflict of interest was obvious. I would seek advice and recuse if the conflict of interest was at best potential or unclear.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents and royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

   My salary as a trial judge in Pennsylvania for 1986 was $65,000 per year. On July 5, 1987 the Legislature and Governor of Pennsylvania raised our salary to $80,000 per year.

From J. Donald McKinney, a gift in the amount of $18,000.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes.

In 1962 I was the southern campaign manager for Jack E. McGregor for the State Senate of Pennsylvania.

In 1965 I was Campaign Chairman for Judge Maurice B. Cohill for Juvenile Court of Allegheny County, Pennsylvania.

In 1966 I was Legislative Campaign Director for the Republican State Committee of Pennsylvania.

In 1966 I was Campaign Treasurer for Athletes and Coaches for Shafer Committee.

In 1967 I was Campaign Chairman for Hunt-Burkardt, County Commissioner Candidates in the primary election and Campaign Chairman for Robert B. Friend for County Controller in the general election.

In 1968 I was Campaign Chairman for Congressman Richard S. Schweiker, Republican Nominee for the U. S. Senate in Allegheny County, Pennsylvania.

In 1969 I was Campaign Chairman for Judge Joseph F. Weis, Jr. for Common Pleas Court of Allegheny County, Pennsylvania.

In 1971 and 1972 I was Campaign Chairman for H. John Heinz III's campaigns for U. S. Congress in the 18th District of Pennsylvania.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	3	600	00
U.S. Government securities—add schedule			0
Listed securities—add schedule			0
Unlisted securities—add schedule Bryn Mawr Properties	34	000	00
Accounts and notes receivable:			
Due from relatives and friends		100	00
Due from others			
Doubtful			
Real estate owned—add schedule	190	000	00
Real estate mortgages receivable			
Autos and other personal property	130	000	00
Cash value—life insurance			
Other assets—itemize:			
* Pa. Trial Judges Retirement			
Cash Value (as of 4/1/88)	65	000	00 (Approx)
Retirement-yrly pmts.			
assuming life till age 74			
(as of 4/1/88)	302	000	00 (Approx)
Total Assets	724	700	00

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt	None		

LIABILITIES			
Notes payable to banks—secured Equibank	22	000	00
Notes payable to banks—unsecured			
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule	145	000	00
Chattel mortgages and other liens payable			
Other debts—itemize: See below	19	517	00
Total liabilities	186	517	00
Net worth	724	700	00
Total liabilities and net worth	538	183	00

GENERAL INFORMATION	
Are any assets pledged? (Add schedule.)	No
Are you defendant in any suits or legal actions?	No
Have you ever taken bankruptcy?	No

*See Attached

Liabilities:

Under $1,000 (All current)

American Express Card Optimum	$ 960.00
Other Debts (Under $500) (All current)	
Kountz & Rider	150.00
Brooks Brothers	460.00
Texaco	195.00
Peoples Natural Gas Co.	425.00
	2,190.00
Liability for prior state service + service time-payable to state retirement fund	17,327.00
	$19,517.00

Supreme Court of Pennsylvania

Administrative Office of Pennsylvania Courts
P. O. Box 11965
City Towers
301 Chestnut Street
Harrisburg, Pennsylvania 17108-1965
(717) 787-8810

NANCY M. SOBOLEVITCH
COURT ADMINISTRATOR
OF
PENNSYLVANIA

September 8, 1987

PERSONAL AND CONFIDENTIAL

The Honorable James R. McGregor
513 Court House
Pittsburgh, Pennsylvania 15219

Dear Judge McGregor:

The following is provided in response to your request for an updated accounting of the actuarial value of your state retirement account as of September 1, 1987:

Value of Retirement Account as of September 1, 1987,
Without Credit for Your Prior State and Military Service:

Previously Taxed Member Contributions	$ 17,520.00
Taxable Member Contributions	$ 17,562.00
Taxable Earned Interest	$ 9,944.00
Total Member Contributions and Earned Interest	$ 45,026.00
Value of Member's Contributions and Interest	$ 45,026.00
Actuarial Value of Employer's Share	$167,491.00
Total Actuarial Value of Account as of 9/1/87	$212,517.00

Value of Retirement Account as of September 1, 1987,
With Credit for Your Prior State and Military Service:

Cost of Prior State and Military Service Credit	$ 17,327.00
Previously Taxed Member Contributions	$ 34,847.00
Taxable Member Contributions	$ 17,562.00
Taxable Earned Interest	$ 9,944.00
Total Member Contributions and Earned Interest	$ 62,353.00
Value of Member's Contributions and Interest	$ 62,353.00
Actuarial Value of Employer's Share	$236,191.00
Total Actuarial Value of Account as of 9/1/87	$298,544.00

I hope that these materials adequately describe the current value of your state retirement benefits; however, if you have questions or if I may be of further service, please feel free to contact me.

Sincerely,

David A. Frankforter
Retirement/Benefits Counselor

/daf

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   I was a United Fund Chairman - Forest Hills, PA. - 1965 (15 hours) and the Eastern Suburbs of Allegheny County, PA. in 1965 (40 hours).

   I was a member of the Board of Directors of the Leukemia Society of Western Pennsylvania in the late 1960s (30 hours).

   Our law firm, McGregor, Dillman, Sheerer & Schuchert, did adoptions for the Catholic Social Services. Myself-10 hours - the firm-100 hours

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge of hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

   I have been a member of Amen Corner since 1964 and a Board of Governor Member since 1969. As President in 1976-77 I personally sponsored blacks for membership and today we have many black members and blacks on our Board of Governors.

   I have been a member of Edgewood Country Club and am currently a member of Oakmont Country Club. Neither of these clubs have any discriminatory provisions in their Constitutions or By-Laws. As a member of the membership committee at Edgewood Country Club I have advocated total non-discrimination in practice and have done the same as a member at Oakmont Country Club. I have also invited black friends to be my guests at both clubs and have encouraged other members to do the same.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led

to your nomination and interviews in which you participated).

Yes. A Federal Court Nominating Commission has been created by U. S. Senators H. John Heinz III and Arlen Specter of Pennsylvania and I was recommended for nomination. The Commission consists of seven lawyers and seven non-lawyers appointed - half by Senator Heinz and half by Senator Specter. This Commission interviewed thirty-eight candidates for three vacancies on the U. S. District Court for the Western District of Pennsylvania. The Commission also had the recommendations of the Allegheny County Bar Association's elected Judiciary Committee who also interviewed most of the candidates. I was also interviewed by members of the Office of Legal Policy in the U. S. Department of Justice.

The Commission recommended me as one of nine of the thirty eight candidates to Senators Heinz and Specter. Senators Heinz and Specter selected the Honorable William L. Standish of the Court of Common Pleas of Allegheny County, PA., Attorney Joseph N. Mack of Indiana County, PA., and myself from the Commission list of nine to be the three candidates to be further examined by the U.S. Department of Justice and if tentatively approved, be subject to an American Bar Association and Federal Bureau of Investigation background checks for professional competence and security, etc.

All persons who interviewed me were very professional and very interested in my professional experience as a lawyer and a judge. I was examined about my record of disposing of some eleven thousand Civil, Family and Criminal Court cases. A very thorough examination of all of the cases that were appealed to the Superior and Supreme Courts of Pennsylvania also was done.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

No one involved in the process of selecting me as a judicial nominee discussed any specific case, legal issue or question in any manner that I reasonably interpreted as seeking any express or implied assurances concerning my position on same. However, the process did cause me to express my profound opposition to racial discrimination in any form as well as my deep seated belief in the Fourth Amendment of our Constitution.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the impositon of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The role of a United States District Judge should never encroach upon the elected legislative nor executive branches of government whose duty it is to promulgate laws and regulations and determine public policy. Moreover, a United States District Judge is duty-bound to follow the decisions of his Circuit Court of Appeals
and the Supreme Court of the United States.

In interpreting the intent of the United States Constitution, and the statutory law, restraint should be exercised to resolve the dispute on the most narrow terms possible and complete restraint should be exercised if the matter is one that should be resolved by the (elected) Congress of the United States or the Executive Branch of the United States Government.

A United States District Judge

1) should be a grievance solver or arbiter,

2) should not extend the litigation of proper and ripe controversy to include others in the solution process,

3) should not be a manager of other institutions in a short or long term,

4) should interpret the Constitution, federal legislation and rules and regulations according to precedents and the intent of elected officials always striving to resolve the grievance in the most restrictive terms,

5) should not impose broad, affirmative duties upon governments and society,

6) should not relax jurisdictional requirements such as standing and ripeness,

7) should not engage in judicial lawmaking,

8) should understand the separate and independent role of the judiciary and be sensitive to human rights and not hesitate to stop illegal and unconstitutional incursions by government,

9) should not improperly permit his personal or political views to be injected into the solution process,

10) should follow court rules closely, and

11) should resolve cases on a statutory basis with the view towards finding a statute constitutional rather than allowing a constitutional challenge.

In conclusion, if litigants are seeking a political or public policy determination or have no standing, or have not presented a ripe controversy, or have not exhausted an administrative remedy and no precedent exists in the Court of Appeals or Supreme Court decisions to resolve the matter, the United States District Judge should dismiss the case. The litigants should find their solution elsewhere rather than asking the courts to encroach on the powers of the other branches or engage in judicial lawmaking to resolve their grievance.

Com. v. Roxanne Marie Wagner

Citation	Rank(R)	Database	Mode
507 A.2d 1237 Pa Super 1986	R 1 OF 56	PA-CS	P

Defendant was convicted in the Court of Common Pleas, Allegheny County, No. (R408716A, McGregor, J., of driving under the influence of alcohol and was sentenced to term of 48 hours to be served in ARC House, and Commonwealth appealed from the judgment of sentence. The Superior Court, No. 260 Pittsburg 1985, Beck, J., held that: (1) trial court, following conviction after second arrest for driving under the influence of alcohol, was statutorily bound to impose minimum jail sentence of 30 days upon defendant, who had accepted placement in accelerated rehabilitative disposition program following her firs arrest for driving under the influence of alcohol, and (2) Commonwealth was no required to allege in information that defendant accepted placement in the program after her first arrest in order for mandatory minimum jail sentence of 30 days to be imposed following conviction after second arrest.

Vacated and remanded.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

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503 A.2d 414 Com. vs Kenneth PELKEY PAGE 3

Citation	Rank(R)	Database	Mode
503 A.2d 414 349 Pa.Super. 373	R 3 OF 56	PA-CS	P

Defendant, who was charged with two counts of homicide by vehicle, one count of driving under the influence, violation of traffic controls, and two counts of homicide by vehicle while driving under the influence moved to suppress results of blood alcohol test. The Court of Common Pleas, Allegheny County, Criminal Division, No. CC8303704, McGregor, J., suppressed the results. The Superior Court, No. 1042 Pittsburgh 1984, Olszewski, J., held that: (1) "implied consent" provision supported validity of search constituted by taking of blood sample from defendant, where record revealed that serious motor vehicle accident had occurred involving driver who was found in semiconscious state with odor of alcohol on his breath, and (2) police officer was justified in ordering blood test of defendant, where he had reasonable grounds to believe that defendant was involved in accident resulting in serious injuries or death.

Reversed.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

IN RE · GARTLEY
(In Re Search Warrant B-21778 Robert Gartley, S

√ 491 A.2d 851 ' aff'd 521 A.2d 422 (1987) PAGE 5

Citation	Rank(R)	Database	Mode
491 A.2d 851 341 Pa.Super. 350	R 5 OF 56	PA-CS	P

A motion to quash search warrant was granted by the Court of Common Pleas, Criminal Division, Allegheny County, July Term, 1982, Misc. No. 319, **McGregor**, J., and the Commonwealth appealed. The Superior Court, No. 958 Pittsburgh, 1982, Rowley, J., held that use of a search warrant to obtain information or evidence from the office of a nonsuspect attorney in course of investigation of client is not per se unreasonable, but execution of carefully tailored warrant, supported by probable cause, should be circumscribed with "particular exactitude," and when issue is timely presented, Courts of Common Pleas should establish procedures to assure that searches are conducted in a manner minimizing intrusions on legitimate privacy interests of attorneys and their clients.

Order quashing vacating and case remanded: jurisdiction relinquished.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. John IANNACCIO

Citation	Rank(R)	Database	Mode
480 A.2d 966 505 Pa. 414	R 8 OF 56	PA-CS	P

Appeal was taken from an order of the Court of Common Pleas of Allegheny County, Criminal Division, No. CC7805134A, James R. McGregor, J., directing Commonwealth to produce confidential informant in camera. The Superior Court, No. 729 Pittsburgh 1980, 304 Pa.Super. 307, 450 A.2d 694, reversed, determining that trial court abused its discretion in finding that Commonwealth failed to prove existence of probable cause to justify issuance of search warrant, and defendant appealed. The Supreme Court, No. 69 W.D. Appeal Docket 1983, Zappala, J., held that: (1) defendant was not entitled to discover identity of informant pursuant to rule allowing discovery of names and addresses of eyewitnesses; (2) defendant failed to meet burden of establishing that informant's statement that he was in defendant's house during a certain 24-hour period was false; and (3) even if defendant established falsity of informant's tip, defendant could not have met his burden of showing that disclosure of requested information was "reasonable" and "in the interests of justice," and thus, was not entitled to have informant produced, since defendant presented no evidence that affiants knew that information supplied by informant was false and deliberately included it in their application for search warrant.

Superior Court order affirmed by an equally divided court.

Nix, C.J., filed opinion in support of reversal.

Larsen, J., filed opinion in support of reversal in which Flaherty, J., joined.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Bernard JERRY

√ 470 A.2d 601 PAGE 9

Citation
470 A.2d 601
323 Pa.Super. 299

Rank(R)
R 9 OF 56

Database
PA-CS

Mode
P

Defendant who was convicted of possession of a controlled substance and receiving stolen property appealed from an order of the Court of Common Pleas of Allegheny County, Criminal Division, No. CC7608301, McGregor, J., denying postconviction relief. The Superior Court, No. 1152 Pittsburgh 1981, Popovich, J., held that: (1) defendant's failure to file posttrial motions did not constitute a waiver where defendant was not advised properly of his posttrial rights; (2) officer's entry onto premises and subsequent arrest of defendant were valid notwithstanding fact that no warrants were obtained; and (3) in absence of other evidence, defendant's unexplained possession of stolen pistol was insufficient to support a conviction for receiving stolen property.

Reversed and remanded for resentencing.

Rowley, J., filed a concurring and dissenting statement.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Jack D. McCASKILL

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 468 A.2d 472                                                     PAGE  10

Citation                   Rank(R)                    Database   Mode
468 A.2d 472               R 10 OF 56                 PA-CS      P
 321 Pa.Super. 266
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The Court of Common Pleas of Allegheny County, Criminal Division at No. 6075 June 1972, McGregor, J., denied petition filed under Post Conviction Hearing Act, and petitioner appealed. The Superior Court, No. 355 Pittsburgh 1981, Spaeth, J., held that trial counsel was ineffective for failure to explore petitioner's statement that he had two alibi witnesses.

Reversed and new trial ordered.

Brosky, J., dissented and filed opinion.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Samuel BENEDETTO

Citation	Rank(R)	Database	Mode
462 A.2d 830	R 11 OF 55	PA-CS	P
316 Pa.Super. 134			

Defendant was convicted in the Court of Common Pleas, Criminal Division, Allegheny County, Nos. CC8104481A and CC8105724A, McGregor, J., of burglary, theft by unlawful taking or disposition, and receiving stolen property, and he appealed. The Superior Court, No. 92 Pittsburgh, 1982, Rowley, J., held that: (1) seizure of stolen ring by police officer was justified under plain-view doctrine: (2) seizure was also justified as being pursuant to defendant's consent: (3) incriminating statement made by defendant was not the product of words or actions on part of the police which were likely to elicit an incriminating response: and (4) defendant could not be convicted for burglary and for offense which it was his intent to commit after entry and, hence, counts of theft and receiving stolen property should have been merged with burglary for sentencing purposes.

Affirmed in part and vacated in part.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. John IANNACCIO

/450 A.2d 694

Citation	Rank(R)	Database	Mode
450 A.2d 694 304 Pa.Super. 307	R 16 OF 56	PA-CS	P

Appeal was taken from order of the Court of Common Pleas of Allegheny County, Criminal Division, No. CC 7805134A, McGregor, J., directing Commonwealth to produce confidential informant in camera. The Superior Court, No. 729 Pittsburgh 1980, Popovich, J., held that trial court abused its discretion in finding as a fact that the Commonwealth failed to prove existence of probable cause to justify issuance of search warrant.

Reversed.

Johnson, J., filed dissenting statement.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Vincent N. Burkley

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Citation	Rank(R)	Database	Mode
443 A.2d 1182 297 Pa.Super. 400	R 18 OF 56	PA-CS	P

Defendant appealed from judgment of sentence of the Court of Common Pleas, Allegheny County, Criminal Division, No. 7900776A, McGregor, J. The Superior Court, No. 1119 April Term 1979, Hoffman, J., held that: (1) evidence was sufficient for jury to find that sharpened screwdriver was under defendant's control and thus properly convicted him for misdemeanor first degree for unlawfully procuring, making or otherwise providing himself with, or unlawful having in his possession, or under his control any weapon, but (2) mere fact defendant's residency in cell was insufficient to raise inference that he exercised requisite intent to control sharpened screwdriver when guards and other inmates had and exercised access to sell; thus, defendant's conviction for prohibited offense of weapon would be reversed.

Affirmed in part and reversed in part.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

442 A.2d 314 Com. v. Raymond WILLIAMS PAGE 19

Citation	Rank(R)	Database	Mode
442 A.2d 314 296 Pa.Super. 97	R 19 OF 56	PA-CS	P

Defendant was convicted in the Court of Common Pleas, Criminal Division, Allegheny County, No. CC 7800747, McGregor, J., of robbery, theft by unlawful taking, violation of Uniform Firearms Act and criminal conspiracy and he appealed. The Superior Court, No. 175 April Term, 1979, Beck, J., held that trial judge's asking defendant before jury whether he had made no statement at all to policemen when they asked him to do so violated defendant's Fifth Amendment right to remain silent and since the question and its timing could reasonably have led jurors to conclude that defendant fabricated alibi after arrest and that his silence constituted admission of guilt, question was prejudicial and prejudice outweighed curative instruction.

Reversed and new trial ordered.

Wickersham, J., filed a dissenting opinion.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

√ 439 A.2d 1230 Com. v. Mark A. MACHI PAGE 20

Citation	Rank(R)	Database	Mode
439 A.2d 1230 294 Pa.Super. 338	R 20 OF 56	PA-CS	P

Defendant was convicted in the Court of Common Pleas, Criminal Division, Allegheny County, No. CC 7801556A, McGregor, J., for operating a lottery, and he appealed. The Superior Court, No. 970 April Term, 1979, Spaeth, J., held that: (1) for purposes of speedy trial rule, defendant's trial did not commence with the suppression hearing, which took place 185 days prior to trial, despite fact that lower court ordered that motion to suppress was to be heard on date of trial and immediately prior to trial, and (2) waiver of defendant's speedy trial rights could not be found where there was neither a signed statement or an on-the-record colloquy establishing waiver.

Reversed; defendant discharged.

Shertz, J., filed concurring opinion.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. William HINES

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Citation              Rank(R)              Database   Mode
437 A.2d 1180         R 21 OF 56           PA-CS      P
 496 Pa. 555
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Defendant appealed from an order of the Court of Common Pleas, Allegheny County, at 3686 May Term, 1970, James R. McGregor, J., denying defendant's petition for postconviction relief. The Supreme Court, No. 80-1-78, Roberts, J., held that: (1) guilty plea colloquy, which did no more than inform defendant of the name of the crime after he had pled guilty, was grossly inadequate as failing to establish that defendant understood the nature and elements of the offenses with which he was charged; (2) trial court improperl denied defendant's request to withdraw his guilty plea simply because defenda made a simultaneous request for new counsel, and without questioning defendan concerning the reasons for withdrawal; and (3) testimony of defendant's trial counsel at postconviction hearing failed to establish that there was a factua basis for the guilty plea or that defendant understood either the charges to which he pled guilty or the consequences of his plea.

Reversed and remanded for trial.

Larsen, J., concurred and filed opinion, in which Flaherty and Kauffman, JJ. joined.

Nix, J., concurred in the result.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

436 A.2d 1010 Com. v. Millard BURTON PAGE 23

Citation	Rani(R)	Database	Mode
436 A.2d 1010	R 23 OF 56	PA-CS	P
292 Pa.Super. 73			

Commonwealth appealed from two orders of the Court of Common Pleas, Allegheny County, Criminal Division, No. CC780-5508, McGregor, J.: the first, suppressin evidence seized from defendant's automobile, and the second, finding defendant not guilty of possessing a small quantity of cocaine. The Superior Court, Nos 202, 203 April Term, 1979, Hoffman, J., held that: (1) police officer's discovery, with the aid of a flashlight, of a bag containing marijuana in plai view on the front seat of defendant's car following defendant's arrest for possession of a handgun without a permit was not improper, and, having properl seized bag of marijuana, officer then had probable cause to seize similar bag he believed contained cocaine which he saw protruding from open brief case in defendant's car while officer was in act of retrieving bag of marijuana, and (2) Commonwealth could not appeal from finding that defendant was not guilty o possessing cocaine.

First order reversed and remanded: appeal from second order quashed.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Terrence WILLIAMS

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435 A.2d 900                                                     PAGE  24

Citation                  Rank(R)                  Database   Mode
435 A.2d 900              R 24 OF 55               PA-CS      P
 291 Pa.Super. 261
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Defendant was convicted in the Court of Common Pleas, Allegheny County, Criminal Division, No. CC77011006, McGregor, J., of burglary and recklessly endangering the life of another, and he appealed. The Superior Court, No. 924 April Term, 1977, Cercone, President Judge, held that: (1) sentence fell withi statutory limits for crimes of that type and was therefore legal, and (2) defendant's claim that postverdict counsel's failure to file postverdict motio as to charges of burglary and recklessly endangering life of another constituted ineffectiveness required that judgment of sentence be vacated and that case be remanded for evidentiary hearing on the claim.

Affirmed in part and remanded with directions.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

434 A.2d 194 Com. v. Frank H. LABIAUX PAGE 25

Citation	Rank(R)	Database	Mode
434 A.2d 194 290 Pa.Super. 189	R 25 OF 56	PA-CS	P

Commonwealth appealed from order of the Court of Common Pleas, Criminal Division, Allegheny County, No. CC7805440A, McGregor, J., suppressing results of a breathalyzer test. The Superior Court, No. 29, April, 1979, Montgomery, J., held that police officers who had observed defendant in building when they answered a call regarding a domestic situation and who had to assist defendant down the stairs because he was staggering, had probable cause to arrest defendant for driving under the influence when they observed defendant driving his truck approximately 15 minutes after initial encounter.

Reversed.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Clifford FUTCH

Citation	Rank(R)	Database	Mode
424 A.2d 1231 492 Pa. 359	R 26 OF 56	PA-CS	P

Commonwealth appealed from an order of the Court of Common Pleas, Allegheny County, Criminal Division, at CC7501862A, May 2, 1980, James R. McGregor, J., holding the statute authorizing peremptory challenges unconstitutional as applied in the selection of jurors for defendant's trial. The_Supreme Court, No. 80-1-93, Roberts, J., held that prosecutor's peremptory challenge of one black prospective juror, who was the first and only veniremen to be questioned on individual voir dire and who was acquainted with staff members of penitentiary where alleged murder took place and who had some exposure to news reports concerning the defendant, together with opinion evidence as to practice of some individual assistant district attorneys in past trials, was insufficient to establish prima facie case of discriminatory exclusion of black prospective jurors.

Order vacated; case remanded.

Nix, J., concurred and filed opinion.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

√ Com. v. David ALLEN

Citation	Rank(R)	Database	Mode
421 A.2d 1094 280 Pa.Super. 599	R 27 OF 56	PA-CS	P

On appeal from an order of the Court of Common Pleas, Allegheny County, Criminal Division, No. 7503712A, McGregor, J., denying appellant's petition to withdraw guilty plea, the Superior Court, at No. 431 April Term, 1979, Spaeth, J., held that since the rule of criminal procedure now governing the timeliness of a petition to withdraw a guilty plea was inapplicable to the present case, the timeliness of appellant's petition was governed by Post Conviction Hearing Act waiver analysis; however, the lower court made no finding on whether appellant "knowingly and understandingly failed to raise" the issue of a defective colloquy with the trial judge at the time plea was accepted, and there was insufficient evidence for the Superior Court to determine whether appellant knowingly and understandingly failed to raise the issue or whether extraordinary circumstances justified his failure to do so; therefore, the lower court's order would be reversed with instructions to appoint counsel to represent appellant, and to conduct an evidentiary hearing to determine whether he had waived the issue of the defective colloquy.

Reversed with instructions.

Wickersham, J., filed a dissenting opinion.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

419 A.2d 538 Com. v. Salvatore Samuel IADEROSA PAGE 28

Citation	Rank(R)	Database	Mode
419 A.2d 538 276 Pa.Super. 439	R 28 OF 55	PA-CS	P

Commonwealth appealed order of the Court of Common Pleas, Allegheny County, Criminal Division, No. CC7708235A, McGregor, J., granting defendant's petition to dismiss complaint charging him with retail theft. The Superior Court, No. 980, April Term, 1978, Montgomery J., held that for purposes of rule setting forth period within which a defendant is to be tried, date of filing of retail theft complaint by department store security official occurred when complaint charging a misdemeanor was formally signed and endorsed by magistrate rather than date security officer went to magistrate to file a summary violation, and six-week delay in filing the complaint, during which the security officer was required to obtain approval by district attorney's office before issuing authority could proceed to endorse the complaint and issue process, was not result of improper prosecutorial design to circumvent mandate of the speedy-trial rule.

Order overruled; case remanded.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Robin A. BERMAN
and Michael T. McStay

Citation	Rank(R)	Database	Mode
396 A.2d 1237 262 Pa.Super. 410	R 29 OF 56	PA-CS	P

In prosecution for possession of marijuana, the Court of Common Pleas, Allegheny County, Criminal Division, Nos. CC7601148 and CC7601563, McGregor, J., entered order suppressing marijuana seized in warrantless search of car, and Commonwealth appealed. The Superior Court, Pittsburgh District, No. 842, April Term, 1976, Jacobs, President Judge, held that in light of one unsuccessful attempt to flee in car, and existence of independent probable cause to believe that evidence of a crime was concealed within car, which probable cause arose from a combination of use of car for delivery of marijuana and informant's statement to police officers that remainder of substance was in car, error occurred in invalidating warrantless search of car.

Order reversed and cases remanded for trial.

Spaeth, J., concurred in result.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Charles Francis TERRELL

Citation	Rank(R)	Database	Mode
393 A.2d 1117 482 Pa. 303	R 31 OF 56	PA-CS	P

Defendant was convicted before the Court of Common Pleas, Criminal Division, Allegheny County, at Nos. CC7502887 and CC7503357, Loran L. Lewis and James R. McGregor, JJ., of voluntary manslaughter and other charges, and he appealed. The Supreme Court, No. 140 March Term, 1976, No. 3 March Term, 1977, Pomeroy, J., held that evidence was sufficient to warrant submission of defendant's charge on involuntary manslaughter, and trial court's failure to submit such instruction required reversal of defendant's conviction of voluntary manslaughter.

Reversed; new trial granted.

Roberts, J., filed concurring opinion in which O'Brien, J., joined.

Nix, J., filed concurring opinion.

Manderino, J., filed concurring opinion.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Carmela McCARTHY

(J)

Citation	Rank(R)	Database	Mode
390 A.2d 236 257 Pa.Super. 42	R 33 OF 56	PA-CS	P

Commonwealth appealed from an order of the Court of Common Pleas, Criminal Division, Allegheny County, at No. CC7602384A, McGregor, J., suppressing evidence seized in a search of defendant's residence. The Superior Court, No. 67 April Term, 1977, Jacobs, President Judge, held that the use of a ruse by police to entice defendant to open a door so that a search warrant could be served did not violate the Fourth or Fourteenth Amendments, where, once the door was open, the police stated their identity and purpose and entered without force to execute the warrant.

Reversed and remanded.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Comm. v. John J. Lyons, Jr.

ⓓ

Citation	Rank(R)	Database	Mode
390 A.2d 752 257 Pa.Super. 142	R 34 OF 56	PA-CS	P

Commonwealth appealed from an order of the Court of Common Pleas, Allegheny County, Criminal Division, No. CC7603813A, McGregor, J., suppressing certain gambling paraphernalia, namely poolmaking and numbers sheets. The Superior Court, No. 63 April Term, 1977, Cercone, J., held that police officers properly ordered defendant from his car and placed him under arrest for driving under influence and officers' action in shutting off automobile engine and securing vehicle were not unreasonable; thus, discovery and seizure of numbers slips and poolmaking sheets pursuant to police caretaking function was not unconstitutional.

Reversed and remanded.

Hoffman, J., filed concurring and dissenting opinion in which Jacobs, President Judge, joined.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

√ 385 A.2d 547 Comm V. Robert P. STEDING PAGE 35

Citation	Rank(R)	Database	Mode
385 A.2d 547 254 Pa.Super. 107	R 35 OF 56	PA-CS	P

The Commonwealth appealed from an order of the Court of Common Pleas, Allegheny County, Criminal Division, No. CC 7601428A, McGregor, J., granting defendant's application to suppress evidence. The Superior Court, No. 888 April Term, 1976, held that: (1) the fact that defendant behaved nervously and apprehensively upon arriving at an airport and that dark green material having the appearance of a trash can liner was protruding from one of his suitcases reasonably warranted a brief and limited intrusion by law enforcement officers; (2) where defendant was unable to supply any identification or to explain why the name he gave was different from the name on the luggage he was carrying, the officers acted properly in requesting that defendant accompany them to an airport office for further questioning; (3) where one of the officers detected a smell recognizable as marijuana camouflaged by perfume emanating from defendant's suitcase, the officers were entitled to arrest defendant and conduct a body search, and (4) in absence of any evidence of force or threats by the officers, the fact that the defendant disclaimed ownership of the suitcase and stated that he did not care if the officers opened the suitcase amounted to a consent to the search.

Order reversed. SUPREME COURT REVERSED SUP. CT.

Hoffman and Spaeth, JJ., dissented.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com. v. Manly BANKS

(d)

Citation	Rank(R)	Database	Mode
378 A.2d 936. 250 Pa.Super. 280	R 36 OF 56	PA-CS	P

A defense motion to suppress physical evidence was granted by the Court of Common Pleas, Allegheny County, Criminal Division, Nos. CC 7507677A and CC 7507679A, McGregor, J., and the Commonwealth appealed. The Superior Court, No. 578 April Term, 1976, Van der Voort, J., held that where police had raided an after-hours club and were awaiting warrants for search of vehicles outside the club and an officer arriving with warrants left his car in the middle of a narrow street, and movant arrived in vehicle and found its passage blocked and it was recognized by officer as the automobile driven by a man who had been arrested in the raid and had escaped, and an officer from outside movant's automobile saw a gun on the seat therein, police were justified in searching movant's vehicle.

Reversed and remanded for trial.

Spaeth, J., dissented and filed opinion in which Hoffman, J., joined.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

√ 375 A.2d 69. Com. v. Eugene GALADYNA &
Albert P. Lawrence PAGE 38

Citation	Rank(R)	Database	Mode
375 A.2d 69. 248 Pa.Super. 226	R 38 OF 56	PA-CS	P

In a criminal proceeding, the Court of Common Pleas, Criminal Division, Allegheny County, at Nos. CC7509227 and CC7509219, McGregor, J., granted defendants' motions to suppress evidence, and Commonwealth appealed. The Superior Court, No. 674 April Term, 1976, Jacobs, J., held that: (1) order was appealable, and (2) officers were justified in making an investigatory stop.

Order reversed and case remanded.

Hoffman and Spaeth, JJ., concurred in result.

END OF DOCUMENT

COPR. (C) WEST 1985 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Com., Dep't of Public Welfare v. Austin WIEAND & Marianne Wieand

✓

Citation	Rank(R)	Database	Mode
362 A.2d 1108 26 Pa.Cmwlth. 179	R 40 OF 56	PA-CS	P

Commonwealth Department of Public Welfare brought action against former patient of state hospital and his wife to recover public funds expended by Department on former patient's behalf. The Common Pleas Court, Allegheny County, James R. McGregor, J., granted nonsuit as to former patient's wife and granted judgment in favor of former patient, and Commonwealth appealed. The Commonwealth Court, No. 1016 C.D. 1975, Blatt, J., held that trial court's determination that Department had burden of detailing actual services rendered including number of meals consumed, amount of medical care administered, and pro rata costs of land, buildings and nonmedical administration, was in error as matter of law; and that per diem charge may properly be used to determine liability of persons subjected to recovery of public funds expended by public hospitals on their behalf, but Department must establish exact number of days of institutionalization, and applicable per diem rate, in order to inform defendant fully as to basis of liability asserted against him and thereby to enable him to assert any available defenses.

Reversed and remanded.

END OF DOCUMENT

COPR. (C) WEST 1986 NO CLAIM TO ORIG. U.S. GOVT. WORKS

AMERICAN BAR ASSOCIATION

Standing Committee on Federal Judiciary
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

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ABA/NET: ABA 461

March 15, 1988

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: JAMES R. McGREGOR
United States District Court
for the Western District of
Pennsylvania

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of James R. McGregor for appointment as Judge of the United States District Court for the Western District of Pennsylvania.

A substantial majority of our Committee is of the opinion that Mr. McGregor is "Qualified" for this appointment. The minority found him to be Well Qualified.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

June 27, 1988 JOHN MALCOLM DUHE, JR.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: John Malcolm Duhe, Jr.

2. Address: List current place of residence address and office address(es).

Home: 109 Oakwood Drive
Lafayette, LA 70503

Office: Room 249, 705 Jefferson St.
Lafayette, LA 70501
Telephone: (318) 264-6821

3. Date and place of birth:

April 7, 1933, New Iberia, LA

4. Marital status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Gloria Ramirez Duhe. Housewife.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Southwestern Louisiana
Lafayette, Louisiana June 1951 to August 1951

Washington & Lee University
Lexington, Virginia September 1951 to June 1953

I did not receive a degree from either of the above universities. I attended the summer session at the University of Southwestern Louisiana simply to get a feel for college study before attending Washington & Lee which I expected to be considerably more demanding than my high school scholastic experience. After two full years at Washington & Lee I left to enter Tulane University (where I had always intended to study law) to take advantage of a combined curriculum offered by Tulane's School of Business Administration and its Law School which would permit me to earn both my undergraduate degree and my law degree in a total of six rather than seven years.

Tulane University
New Orleans, Louisiana September 1953 to June 1957

I received a BS degree in Business Administration from Tulane in 1955 and an LLB degree from Tulane in 1957.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Legal Position:

From June 29, 1984 to present, I have served as U. S. District Judge, Western District of Louisiana, Lafayette-Opelousas Division, Lafayette, Louisiana. My office is located at 705 Jefferson Street, Room 249, Lafayette, Louisiana, 70501 in the Federal Building.

From January 2, 1979 to June 29, 1984, I served as Judge of Division E of the 16th Judicial District Court of the State of Louisiana comprising the Parishes of Iberia, St. Martin and St. Mary. My office was located at 300 Iberia Street, New Iberia, Louisiana, 70560 in the Iberia Parish Courthouse.

From September of 1957 through December 31, 1978 I was a partner in the firm of Helm, Simon, Caffery and Duhe and its successor law firms, with offices at 114 West Washington Street, New Iberia, Louisiana, 70560; later relocated to 420 Iberia Street, New Iberia, Louisiana 70560.

Business Positions:

I am General Manager of Duhe Land Company which is a partnership composed of myself, my brother, Thomas G. Duhe, and my sisters Verna Duhe Dalton and Louise Duhe Blandon. I have been its Manager since its organization in June, 1973. The partnership owns undivided interests in lands, donated to the partners by our parents and collects the revenues from oil and gas leases and mineral production therefrom. These revenues are in part disbursed to the partners and in part accumulated and reinvested primarily in government bonds and improved real property.

I was a partner in Duhe Brothers Planting Company from approximately 1964 until that partnership was merged into J. Paulin Duhe, Inc., Rt. 7 Box 455, New Iberia, Louisiana, in December 1982. I was a member of the Board of Directors of J. Paulin Duhe, Inc. from August 1980 to August 1986. Both are family companies. Duhe Brothers Planting Co. was engaged in farming sugar cane, soybeans and rice. My participation in management was peripheral and consisted of quarterly regular meetings and occasional special meetings of the partners.

J. Paulin Duhe, Inc. is a land holding and farming family corporation. Day to day management is in the hands of a manager and assistant manager. I participate only in stockholder meetings.

The members of the Duhe family own small undivided interests in numerous tracts of swamp land and some high land scattered throughout the south central part of Louisiana. Some of it is productive of oil and gas and some of it is potentially productive. I used to negotiate all oil and gas leases and handle related matters for the family. This was accomplished in my own time after hours and on weekends except for receiving occasional telephone calls at my judicial office.

I was Secretary of, and a member of the Board of Directors of Land Coast Insulation Co., Hanger Drive, Acadiana Regional Airport, New Iberia, LA (formerly Immacco Insulation Co.) from 1974 or 1975 until shortly before I assumed my judicial duties. I was never active in the management of that business.

In October of 1976, I, with William D. Quinlan of New Iberia, LA, and others, organized Acqua Static Testing Technologists, Inc. domiciled in Iberia Parish, LA for the purpose of engaging in the hydrostatic testing of pipe. I served as a director. The business was not successful and ceased operation in 1977 or 1978.

From 1976 until 1984 I owned some agricultural equipment used to harvest sugar cane under the trade name "Sucrose Equipment Rentals". I furnished the equipment and harvesting services to J. Paulin Duhe, Inc. The business was managed by my brother, Thomas G. Duhe.

From October, 1968, until July, 1970, I was a stockholder, officer and director of Thermo-Kinetics, Inc. a company organized by myself and others for the manufacture of microwave ovens. Day to day management was handled by Mark R. Pharr, Jr., at 220 Edgewater Drive, New Iberia, who was the principal owner and entrepreneur. The company was sold to Hobart Manufacturing Co. which now builds and markets the oven under its "Kitchen-Aid" name.

Mr. Pharr, William D. Quinlan, 10 Rue DeVerger, New Iberia, and I purchased Rex Truck Lines, Inc., a regulated oil field trucking company in July, 1975. I was an officer, director and shareholder until April, 1978, when the company was sold back to its original owner, Mr. Rex J. Champagne, Sugar Mill Road, New Iberia, Louisiana. While I was an owner, I took little part in day to day management, that being left to Mr. Pharr.

For a short time during 1980 and 1981, I replaced my late father as a member of the Board of Directors of American Discount Corporation, P. O. Box 282, Abbeville, LA. I am no longer a director.

Non-Business Positions:

I am Trustee of two trusts established by my cousin Edward T. Weeks, III, of New Iberia, LA for his children. All assets of the trust consist of a brokerage account with a national brokerage firm, shares in a mutual fund and a small amount of cash. Actual management is conducted by the broker. I have held this position since the trusts were established in November, 1970.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   I have had no military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

   Editor-In-Chief, Tulane Law Review

   Order of the Coif, Tulane Law School

9. Bar Associations: List all bar associatins, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

   Iberia Parish Bar Association
      Secretary-Treasurer (dates unavailable)
      President - 1973-74

   Louisiana State Bar Association

   Louisiana District Judges Association

   American Bar Association

   Federal Judges Association

   United States District Judges Association (Fifth Circuit)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organization to which you belong.

    I belong to no organizations active in lobbying before public bodies.

    Cypremort Yacht Club and those listed in 9. above.

    I am not an active member of but do own a share of stock in Iberia Golf and Country Club.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Louisiana Supreme Court	June 12, 1957
United States District Court Western District of Louisiana	November 28, 1962
United States Supreme Court	August 1, 1978

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please suppy one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

    Navigable Streams - Tests of Navigability 30 Tul. L. Rev. 332 (1956)

    Jury Wisdom, L.A.D.C. Newsletter, May 1988 (copy attached).

    Numerous opinions as judge.

13. Health: What is the present state of your health? List the date of your last physical examination.

    Good. In January of 1988, I was diagnosed as suffering from nephrotic syndrome. I am being treated by Dr. Edward S. Hyman, 3525 Prytania Street, Suite 220, New Orleans, LA 70115. Except for the month of January, it has not interfered with my duties and is not expected to.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

    From June 29, 1984 to present, I have been U. S. District Judge, Western District of Louisiana, Lafayette-Opelousas Division, Lafayette, Louisiana with the usual civil and criminal jurisdiction. I was appointed by President Reagan.

    I was elected Judge of Division E of the 16th Judicial District Court of the State of Louisiana and assumed the duties of that office in January, 1979. This is a court of first instance with complete civil, criminal, juvenile, probate and family jurisdiction.

The district includes the parishes (counties) of Iberia, St. Martin and St. Mary. A total of six judges serve the district.

15. Citations: If you are or have been a judge, provide:

(1) citations for the ten most significant opinions you have written;

STATE OF LOUISIANA, EX REL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL V. THE UNITED STATES OF AMERICA; THE SECRETARY OF THE INTERIOR; THE DIRECTOR OF THE MINERALS MANAGEMENT SERVICE; AND SAMEDAN OIL CORPORATION, No. 86-0924 "L", U.S. District Court, Western District of Louisiana, Lafayette-Opelousas Division, 832 F.2d 935 (1987), 656 F. Supp. 1310 (1986).

UNOCAL CORPORATION AND UNION OIL COMPANY OF CALIFORNIA V. MESA PETROLEUM CO., MESA PARTNERS II, MESA ASSET CO., MESA EASTERN, INC., CY-41, INC., JACK-41, INC., T. BOONE PICKENS, JR., CYRIL WAGNER, JR., AND JACK E. BROWN, No. 85-1004 "L", U.S. District Court, Western District of Louisiana, Lafayette-Opelousas Division, 616 F. Supp. 149 (1985).

FRED VINCENT, ET UX V. SOUTHWEST LOUISIANA ELECTRIC MEMBERSHIP CORPORATION, ET AL, No. 85-3218 "L", U.S. District Court, Western District of Louisiana, Lafayette-Opelousas Division, 666 F. Supp. 94 (1987).

USA THRU ITS AGENCY, EPA V. HILL PETROLEUM COMPANY, No. 85-0184 "L", U.S. District Court, Western District of Louisiana, Lafayette- Opelousas Division.

THE SUPERIOR OIL COMPANY V. TRANSCO ENERGY COMPANY, ET AL, No. 84-2138 "L", U.S. District Court, Western District of Louisiana, Lafayette-Opelousas Division, 616 F. Supp. 98 (1985).

PLANTERS TRUST AND SAVINGS BANK V. W. T. LANGLEY, ET UX, No. 83-2612 "L" consolidated with W. T. LANGLEY, ET UX V. PLANTERS TRUST AND SAVINGS BANK OF OPELOUSAS, ET AL, No. 84-0557 "L", U.S. District Court, Western District of Louisiana, Lafayette-Opelousas Division, 615 F. Supp. 751 (W.D. La. 1985), aff'd, 792 F.2d 547 (5th Cir. 1986), cert. granted, 107 S.Ct. 871 (1987). See also 615

F. Supp. 749 (W.D. La. 1985), aff'd, 792 F.2d 541 (5th Cir. 1986), aff'd, 108 S.Ct. 396 (1988).

MARY LOUISE SIMBOLI CARNEY, ET AL V. MARATHON OIL COMPANY, No. 83-2517 "L", U.S. District Court, Western District of Louisiana, Lafayette-Opelousas Division, 632 F. Supp. 1037 (1986).

FRED RINGE AND BRENDA RINGE V. JAMES ROMERO, ET AL, No. 84-2135 "L", District Court, Western District of Louisiana, Lafayette-Opelousas Division, 624 F. Supp. 417 (1985).

IN THE MATTER OF THE COMPLAINT OF ANGELA BRILEY, INC., OWNER OF THE M/V ANGELA BRILEY FOR EXONERATION FROM OR LIMITATION OF LIABILITY, No. 82-2462 "L", consolidated with 83-2003, 83-2118, 83-2265, 83-2267, 83-3104, 84-0076, U.S. District Court, Western District of Louisiana, Lafayette-Opelousas Division.

ALFREDA TRAHAN, ET AL V. LAFAYETTE PARISH SCHOOL BOARD, No. 10-903 "L", U.S. District Court, Western District of Louisiana, Lafayette-Opelousas Division, 616 F. Supp. 220 (1985), 27 Ed. Law. Rep. 813.

(2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

I maintain no records from which the information called for could be obtained. I have had conducted through the Westlaw Data Base and cross checked with the Lexis Data Base, a search in my name and attach hereto the Westlaw printout of cases shown to have been reversed or remanded with the summary thereof provided by Westlaw.

(3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Fred Ringe and Brenda Ringe v. James Romero, et al, 624 F. Supp. 417 (1985). This decision was not appealed.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have held no public office except my judicial offices, (January 1979 to date) and membership on the Republican Executive Committee for Iberia Parish (1960's to 1970's) nor have I ever been an unsuccessful candidate for public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I have never clerked for a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

Partner in Helm, Simon, Caffery and Duhe, 420 Iberia Street, New Iberia, Louisiana (and its successor firms listed below) from September 1957 through December 1978 when I withdraw from the firm to assume duties as Judge of Division E, 16th Judicial District Court, State of Louisiana.

Helm, Simon, Caffery & Duhe
Caffery, Duhe & Davis
Caffery, Duhe, Oubre & Gibbens

b) 1. What was the general character of your law practice, dividing it into periods with dates if its character changed over the years.

Our law firm had a general civil practice during my entire tenure with it. In the early years it was about evenly divided between insurance defense litigation on the one hand and oil and gas, land title examinations, probate, corporate, and commercial work on the other. Gradually the oil and gas and land title work decreased and the insurance defense work increased.

My personal practice followed the same pattern. In the early years about 40% of my practice was mineral law and land title work for major oil companies and independent oil companies; 30% commercial, corporate and business related matters including litigation; 20% insurance defense litigation; and 10% probate, tax and estate planning work. In the later years of practice approximately 10% of my time was spent on mineral law and land title matters, 10% in probate, tax and estate planning work; 30% in commercial, corporate and business related matters and 40% in insurance defense litigation.

During the first three years of practice I spent most of my time assisting one or the other of my partners in files for which they had primary responsibility for almost every file I handled.

At all times, at least 50%-60% of all work that I handled was in litigation.

2. Describe your typical former clients, and mention the areas, if any, in which you specialized.

Texaco, Inc., Estate of William G. Helis, B. F. Trappey's Sons, Inc., Gordy Salt Co., Inc., Delcambre Telephone Co., Inc., Directional Drilling, Inc., M.A. Patout & Son, Ltd., W. L. Estis Well Service, Inc., Southern Farm Bureau Casualty Insurance Co., Travelers Insurance Co., Commercial Union Insurance Companies, Employer's Casualty Co. (and related companies).

c) 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Regularly.

2. What percentage of these appearances was in:

(a) federal courts;

10%

(b) state courts of record;

90%

(c) other courts.

0%

3. What percentage of your litigation was:

(a) civil;

100%

(b) criminal.

0%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have now been on the bench ten years and really have no recollection from which to answer this question. Records from my former law firm from which the answer to this question might be determined are not available to me. However, my best estimate is as follows:

30 as sole counsel

5 as chief counsel

5. What percentage of these trials was:

(a) jury;

10%

(b) non-jury.

90%

18. Litigation: Describe ten of the most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a) the date of representation;
b) the name of the court and the name of the judge or judges before whom the case was litigated; and
c) the individual name, address and telephone numbers of co-counsel and of principal counsel for each of the other parties.

In selecting cases to be referred to I have attempted to choose those which involved new or novel points of law, changes in the law, and are examples of the various types of litigation in which I was involved as an attorney. I have interpreted the term "litigated" in the question to mean tried to judgment, therefore I have not included any cases which were compromised although most of the significant cases in which I was involved were concluded by compromise.

KATHERINE G. BOUDREAUX V. CARL K. WELCH, ET AL, #30190, 16th Judicial District Court, St. Mary Parish, Louisiana; 180 So. 2d 725 (1st Cir. 1965); 249 La. 983, 192 So. 2d 356 (1966); rehearing denied December 12, 1966.

Suit was brought by plaintiff alleging herself to be the widow of the decedent against the owner, driver and insuror of the vehicle which caused decedents death, to recover damages for his death pursuant to Louisiana Civil Code Article 2315. A motion for summary judgment was filed by me on behalf of the defendants which was heard on October 19, 1964 and which resulted in dismissal of plaintiff's claim. The late Hon. E. L. Guidry presided. His decision was affirmed by the First Circuit Court of Appeal and reversed by the Louisiana Supreme Court with (now retired) Justice Frank Summers dissenting. Rehearing was denied by the Supreme Court and thereafter the case was compromised.

Plaintiff was represented by Mr. Jack C. Caldwell of Aycock, Horne, Caldwell and Coleman, 519 Main Street, Franklin, LA 70538 (318-828-1880).

I handled every aspect of the matter for all defendants in each court.

The case is significant because it reversed Louisiana law on the right of a third party to collaterally attack a divorce decree of another state. The motion raised the issue that plaintiff was not the spouse of the decedent, who was her second husband, because, at the time she received a divorce from her first husband from the State of Mississippi, neither she nor her first husband was domiciled in that state. Therefore, the Mississippi decree was an absolute nullity and not entitled to full faith and credit under either the U. S. or Louisiana Constitution. In this decision the Louisiana Supreme Court held that, although the residence requirements had not been met, the decree was unassailable elsewhere. This was a reversal of prior law.

ELISE SAUCE, ET AL V. R. A. BUSSELL,
ET AL, and C. W. RAMSHUR, ET AL
V. ALLSTATE INSURANCE CO., ET AL,
#39332 & #40415 16th Judicial District
Court, St. Mary Parish, Louisiana;
288 So. 2d 428 (1st Cir. 1973); writ
granted 290 So. 2d 329 (March 1, 1974);
La. 298 So. 2d 832 (1974);
rehearing denied August 30, 1974.

These were two of eleven consolidated cases seeking recovery for damages for personal injury and property damage against numerous defendants arising out of the explosion of a residence in St. Mary Parish, Louisiana. Matters at issue for present purposes were heard by Judge E. L. Guidry, Jr., February 5, 1973.

I represented J. Ray McDermott & Company, Inc. developer of the subdivision and builder of the residence, and its insuror, Travelers Insurance Co. in each of the eleven cases from commencement through the stages here related. For present purposes only the two above cases are pertinent. Subsequent to the developments here related, I withdrew from the law firm to assume my judicial duties and one of my former partners handled the remaining aspects of the cases.

Other parties were represented as follows: Mr. John H. Brooks and Mr. Gregory Laborde, 847 3rd Street, Gretna, LA 504-362-6272 for appellants; Mr. Timothy J. McNamara, Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Suite 700, 666 Jefferson Street, P. O. Drawer 3507, Lafayette, LA 70502, 318-237-2660 and Mr. Robert L. Cabes, Cabes, Tracy & Perret, Suite 101, 221 Rue DeJean, P. O. Box 53903, Lafayette, LA 70505, 318-232-5448, for R. A. Bussell & Allstate Ins. Co.; Mr. Dermot S. McGlincney, McGlinchey, Stafford & Mintz, 630 Camp Street, P. O. Box 2000, New Orleans, LA 70176, 504-586-1200 and Mr. Robert E. Kerrigan, Jr., Deutsch, Kerrigan & Stiles, 4700 One Shell Square, New Orleans, LA. 70139, 504-581-5141 for Friedrich Refrigerators, Inc.; Mr. Michael J. McNulty, Jr., Bauer, Darnall, McNulty &

Boudreaux, Lawless Building, P. O. Box 565 Franklin, LA 70538, 318-828-2570, present address, P. O. Box 292, Franklin, LA 70538, 318-828-4100, for City of Morgan City and U. S. Fidelity & Guaranty Co.; Mr. Jack C. Caldwell, Aycock, Horne, Caldwell & Coleman, 519 Main Street, Franklin, LA 70538, 318-828-1880, for Gulf Coast Electrical Supply, Inc. & Master Electric Service Co., Inc.; Mr. Welton P. Mouton (now deceased) 303 W. Vermilion Street, P. O. Box 4408, Lafayette, LA 70502, 318-234-1441, for Fred Carreras Mechanical Contractors, Inc.; Mr. J. Winston Fontenot, 1206 Lafayette Street, P. O. Drawer 4407, Lafayette, LA 70502, 318-237-0261, for Leon Naquin & Son Electrical Contractors, Inc.

All eleven cases had been pending for five years and were fixed for trial on February 5, 1973, following a pre-trial conference on October 10, 1972. Because of plaintiff's failure to file a bond for costs, the City of Morgan City and its insuror were dismissed as of non-suit. On the day of trial, plaintiff's in the above two cases sought to stay the proceedings on the ground that identical suits were pending in Orleans Parish. The motion was denied. Plaintiffs then sought a continuance on the ground that C. W. Ramshur was too ill to be present. The court denied the motion but offered to hold the record open for his deposition. Plaintiff's counsel declined and refused to proceed to trial after being ordered to do so by the trial judge. Defendants then moved to dismiss with prejudice under Louisiana Code of Civil Procedure Articles 1601 and 1602 which motion was granted. An appeal was taken to the First Circuit Court of Appeal and the trial court was sustained. Writs were granted by the Louisiana Supreme Court and the Trial and Appellate Courts were reversed with (now retired) Justice Frank Summers dissenting, and the cases remanded.

The cases are significant because they represent a limiting of the trial courts right to control the flow of business before it; and they constitute a good example of the complex, multi-district litigation I handled during much of my practice.

GREEN V. WRIGHT, ET AL, #52867
16th Judicial District Court, St.
Mary Parish, Louisiana, 365 So. 2d
551 (1st Cir. 1978).

Plaintiff, an employee of Cargill, Inc. at its salt mine in St. Mary Parish, Louisiana, sued four co-employees as "executive officers" of Cargill, Inc. and Cargill's liability insuror, Commercial Union Insurance Co., for personal injuries sustained by him in an explosion in the mine on the job. The case was tried on March 13, 14, 15 and 16, 1978 to a twelve member jury with the Hon. Robert M. Fleming presiding. The jury returned an in-globo award of $902,000 in plaintiff's favor which was affirmed on appeal.

I represented Thomas Edward Holeman, the mine superintendent and admittedly an executive officer of Cargill and Commercial Union Insurance Co. I handled every aspect of the matter and the trial for them and was lead trial counsel for all defendants.

Other parties were represented as follows: Mr. William D. Hunter, 1020 David Drive, P. O. Box 2464, Morgan City, LA 70381, 504-385-1904 for plaintiff and appellee; Mr. W. Arthur Abercrombie, Jr., Taylor, Porter, Brooks & Phillips, 8th Floor, 451 Florida Blvd., Drawer 2471, Baton Rouge, LA 70821, 504-387-3221 for Dale Wright, James Gustafson, A. J. Boutte and Edwin Holeman; Mr. Thomas K. Kirkpatrick, Kirkpatrick, Keyser & Kirkpatrick, Suite 1-K, 5551 Corporate Blvd., Baton Rouge, LA 70808, 504-926-0430 for James Gustafson.

The case was significant for the reasons that:

1) Exposure of the defendants was nearly $1,000,000.

2) The decision represented a significant extension of the meaning of the term "executive officer" as applied to a giant, multi-national corporation because it included within that category a single shift shop foreman, single shift production foreman and safety engineer of one of the corporation's very smallest and least significant operations.

3) The Court allowed, in one of the very few such cases in the jurisdiction, to do so, opinion evidence to be given by a non-qualified expert on the very issue the jury was called upon to decide.

CHRISTOFFERSON V. HALLIBURTON, ET AL
V. PHILLIPS PETROLEUM COMPANY, #
United States District Court, Western
District of Louisiana, Lafayette
Division, 617 F. 2d 403 (5th Cir. 1980).

Plaintiff, a petroleum engineer employed by Phillips Petroleum Company (well owner), was seriously injured aboard a jack-up drilling barge belonging to Diamond M Drilling Co. located in the Gulf of Mexico, 100 miles off the Louisiana coast when a steel reinforced flexible rubber hose owned by Diamond M Drilling Co. failed under pressure while cement was being pumped through it to plug and abandon the well. Defendants settled with plaintiff then tried the case among themselves to the Hon. Richard J. Putnam without a jury on February 7, 8, 9, 10, 11, 14 and 16, 1977 to determine the cause of the failure and whether indemnity was due among any of the defendants. Defendants were the well owner (Phillips), the "operating group" (Halliburton and Diamond M) and the "hose group" (B. F. Goodrich Rubber Co., Aeroquip, Inc., Coastal Rubber Co., and George Meyer Co. and their insurors). It involved all aspects of a product liability cause (faulty design, faulty quality control, failure to warn, misuse of the product) and complicated contractural questions.

Judge Putnam found that the hose was not defective but was misused and improperly maintained by Diamond M and that Diamond M was entitled to indemnity from Phillips. He was affirmed on appeal.

I represented Aeroquip, Inc. and its insuror during all stages of pre-trial preparation and trial. On appeal the matter was argued by my partner John Blackwell.

Other parties were represented as follows: Mr. W. Paul Hawley, Hawley & Schexnayder, Ltd., 515 W. Convent St., P. O. Box 2756, Lafayette, LA 70502, 318-234-7496, for plaintiff; Mr. John B. Scofield, Scofield, Bergstedt, Gerard, Hackett & Mount, 1114 Ryan St., P. O. Drawer 3028, Lake Charles, LA 70601, 318-433-9436, for Phillips Petroleum Co.; Mr. Allen L. Smith, Jr., Plauche', Smith, Hebert & Nieset, 1123 Pithon Street, P. O. Drawer 1705, Lake Charles, LA 70602, 318-436-0522, for Halliburton Industries, Inc.; Mr. Joseph J. Weigand, Jr., Weigand & Siegrist, 7 Progressive Blvd., P. O. Box 6062, Houma, LA 70361, 504-876-3071, for Diamond M Drilling Co.; Mr. H. Lee Leonard, Voorhies & Labbe, 718 S. Buchanan Street, P. O. Box 3527, Lafayette, LA 70502, 318-232-9700, for Coastal Rubber Co. & Uniguard Ins. Co.; Mr. Donald T. Phelps & Mr. John Swanner, Seale, Smith & Phelps, Suite 200, 4041 Essen Lane, Baton Rouge, LA 70809, 504-927-9430, for George Meyer & Co.; and Mr. Eldon T. Harvey, III, Hammett, Leake, Hammett, 2500 Canal Place One, New Orleans, LA 70130, 504-581-2121, for B. F. Goodrich Co.

The case is significant, insofar as I was involved, as an example of the type and nature of maritime related matters I handled and because it involved very lengthy and detailed conflicting expert testimony on the product liability aspect and complex drilling contract interpretation.

> TERREBONNE PARISH SCHOOL BOARD V. TEXACO, INC., 17th Judicial District Court, Terrebonne Parish, Louisiana, 178 So. 2d 428 (1st Cir. 1965), writ refused 179 So. 2d 640, 248 La. 465 (1965), certiorari denied 86 S. Ct. 1568, 348 U. S. 950, 16 L. Ed. 2d 546.

Terrebonne Parish School Board and its lessees brought suit to cancel a mineral lease granted by the State Mineral Board which came to be owned by Texaco, Inc. insofar as any water bottoms covered by said lease were situated within Section 16, Township 21 South, Range 14 East. The State of Louisiana and the State Mineral Board intervened and adopted the position of Texaco, Inc. The factual issue was the navigability of a body of water known as Mud Hole Bay in 1812 when Louisiana was admitted into the Union. It was the position of defendant and intervenor that it was navigable then, and its bed, therefore, was owned by the State of Louisiana by virtue of its inherent sovereignty, therefore, only the Mineral Board had the right to lease it. Petitioners contended that the Louisiana Legislature granted School Boards full authority over 16th Sections regardless of their physical characteristics and 16th Sections were dedicated to public school purposes by the United States prior to Louisiana's Statehood, therefore, title is in the State subject to this trust and only the School Board could grant a valid lease. The property was productive of oil and gas at the time.

The case was tried to the Hon. P. Davis Martinez without a jury in September, 1962. Plaintiffs prevailed in the Trial Court and defendant and intervenors prevailed on appeal to the First Circuit. As noted, writs were denied by the Louisiana and United States Supreme Courts.

Texaco, Inc. was represented at the trial stage by Lawrence P. Simon and myself of our firm and Daniel P. Hurley of Texaco, Inc.'s legal department in New Orleans. Mr. Simon died following the trial and Mr. Charles F. Bailey, 812 E. St. Mary Blvd., Lafayette, LA 70501, 318-235-9491, was associated to handle argument in the First Circuit. My participation in the case was to assist Mr. Simon in the trial; develop with the expert witnesses their testimony and the exhibits they would use (which were most numerous) and to write the trial and appellate briefs.

Other parties were represented as follows: Mr. Wiley G. Lastrapes and Mr. Daniel P. Hurley, Texaco Bldg., New Orleans, LA 70112, 504-524-3160 for appellants; Mr. Lloyd J. Cobb, of Cobb& Wright, now deceased, Mr. Mettery I. Sherry, Jr., Sherry & Villarrubia, 1900 Veterans Memorial Blvd., Metairie, LA

70004, 504-837-2533; Mr. Wilmore J. Broussard, Jr., Judge, District Court, Courthouse, Houma, LA 70360, 504-872-6423; Mr. Herbert W. Christenberry, Jr., Christenberry & Bruneau, Ltd. 1002 American Bank Building, New Orleans, LA 70130, 504-529-2376 for appellees; Mr. Jack P. F. Gremillion, Sr., Attorney General, State of Louisiana, Mr. Edward M. Carmouche, Mr. John L. Madden and Mr. John A. Bevins, Assistants Attorney General, Baton Rouge, LA 70821, 504-342-7013, for intervenors; and Milling, Benson, Woodward, Hillyer, Pierson & Miller, 1100 Whitney Building, New Orleans, LA 70130, 504-581-3333, amicus curiae.

This case is significant to me for a number of reasons. It is the first (and may be the only) case in this jurisdiction in which experts in the fields of geomorphology, micro-paleontology and radio chemistry (carbon 14 dating process) were used. It, for the first time, clearly delineated the circumstances under which waterbottoms were owned by the State and declared the effect of the normal "qualified" approval given by the Mineral Board to leases granted by other State agencies.

JERRY JOHN TRAHAN V. TEXACO,
INC. ET AL, #17,406-L, United
States District Court, Western
District, Lafayette Division

Plaintiff sued in admiralty to recover for personal injuries incurred when his employer's vessel, on which he was working, struck the well head of a gas well owned by Exxon, Texaco and Sun Oil Co. located in Lake Sand, a navigable body of water located within the boundaries of Louisiana. Defendants were the well owners. Defendants filed a third party demand against plaintiff's employer Cardinal Wireline Services, Inc. It was tried to a six member jury on October 15, 16, 17 and 18, 1973 with the Hon. Richard J. Putnam presiding.

Cardinal had settled with plaintiff before trial for $18,700.00 by which agreement plaintiff agreed to indemnify Cardinal to the extent of one-half of his recovery up to a maximum of $9,350.00. The jury found defendants negligent and awarded plaintiff $10,864.86 which included $3,246.86 in medical expenses paid by Cardinal.

I represented all defendants at all stages of the proceedings.

Plaintiff was represented by Mr. Joseph A. Koury, Koury & Koury, P. O. Drawer 2309, Lafayette, LA 70502, 318-234-4523.

Cardinal Wireline Specialists, Inc. was represented by Mr. John Allen Bernard, Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Suite 700, 666 Jefferson Street, P. O. Drawer 3507, Lafayette, LA 70502, 318-237-2660.

In addition to being an example of the type of maritime litigation I handled, the case presented an interesting question concerning apportionment of the jury's award between plaintiff and Cardinal in light of the terms of their settlement contract and the right of Exxon, et al to indemnity from Cardinal, and whether, in light of Executive Jet Aviation, Inc. v. Cleveland, 93 S. Ct. 493 (1972), this was a maritime case or only a diversity case and, therefore, prescribed.

EUGENE O'BRIEN V. COLUMBIAN CARBON CO., #24218, 16th Judicial District Court, St. Mary Parish, Louisiana, 109 So. 2d 285 (1st Cir. 1959).

Plaintiff brought suit against Columbian for damages under Louisiana Civil Code Article 2315 for personal injuries sutained by him when an elevator tower on which he was working for his employer, Horace B. Rickey, Inc., and which was being built for Columbian at its carbon black plant pursuant to contract, fell. Rickey's worker's compensation carrier intervened to recover compensation and medical expenses paid by it to O'Brien who was very severly injured. The matter was tried on December 10, 11, and 12, 1957 to the late Hon. Rene H. Himel without a jury and resulted in a judgment in favor of Columbian rejecting the demands of plaintiff and intervenor.

The late Mr. Lawrence P. Simon and myself represented Columbian and its insuror. The trial was conducted by Mr. Simon and myself but the case was prepared for trial and briefed in both trial and appellate courts by me.

Plaintiff was represented by Milton L. LeBlanc, 111 Rue Iberville, Suite 510, New Orleans, LA 70130, 504-523-6225.

Intervenor was represented by Mr. Richard C. Meaux, Davidson, Meaux, Sonnier & Roy, 810 S. Buchanan Street, P. O. Drawer 2908, Lafayette, LA 70502, 318-237-1660.

The case is significant because it is one of the relatively few and one of the earliest cases where the "sole remedy" provision of the worker's compensation act was used successfully to defeat a tort claim against the owner of a work by the employee of an independent contractor.

> STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS V. EDGAR P. GOSLING, ET AL, #20731, 20736 & 20741, 16th Judicial District Court, Iberia Parish, Louisiana, and STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS V. EDGAR P. GOSLING, EXECUTOR, #20736, 16th Judicial District Court, Iberia Parish, Louisiana.

These four cases are expropriation proceedings by the State to acquire land for highway purposes brought against owners of several contiguous tracts of land. The first three were consolidated for trial and tried to the late Hon. E. L. Guidry on March 10 and 11, 1964 and the fourth was tried before him on March 12, 1964.

I represented all landowners, prepared the cases for trial and tried them. They were not appealed and all resulted in substantial recovery for the landowners above what was offered them by the State.

The Department was represented by Mr. Braxton B. Croom in the first three and by Mr. Jesse I. Moore, Jr. in the latter. Louisiana Department of Highways, P. O. Box 44245, Baton Rouge, LA 70804, 504-342-6732.

The cases are significant as examples of my representation of landowners and for dealing with the use and effect of awards in other unrelated expropriation cases in the area as "comparables" to establish value of property taken and damage to remaining property.

ALTON ROMERO V. McCORMICK OIL & GAS CORP., ET AL #24430, 16th Judicial District Court, St. Martin Parish, Louisiana.

Plaintiff sued McCormick Oil & Gas Corp., Getty Oil Co., Harold J. Resweber, and their insurors to recover for damage to his rice crop he alleged was caused by toxic chemicals discharged by defendants into the freshwater stream from which he obtained irrigation water for his crop. It was tried to a twelve person jury on June 14, 15 and 16, 1971, the late Hon. S. O. Landry presiding and resulted in an award of $45,000.00 to plaintiff against all defendants in solido.

I represented Getty Oil Co. and its insuror, Travelers Insurance Co. at all stages of the proceedings and tried the case.

Plaintiff was represented by Mr. Earl H. Willis, 106 W. Berard St., St. Martinville, LA 70583, 318-394-6267.

McCormick Oil & Gas Corp., Harold Resweber and their insuror, Continental Casualty Co. were represented by Mr. Patrick Juneau, Jr., Voorhies & Labbe, 718 S. Buchanan Street, P. O. Box 3527, Lafayette, LA 70502, 318-232-9700.

The case represents some of the early environmental litigation in this area.

JOHN LYLE BAYLESS, JR., ET AL
V. DONALD C. ROANE, ET AL,
#20369, 16th Judicial District
Court, Iberia Parish, Louisiana.

Landowners brought suit against owner of flying service and his insuror for chemical damage allegedly done to live oak trees on plaintiff's property while conducting aerial spraying operations on crops on adjoining property. The matter was tried on November 7, 1962 to the late Hon. E. L. Guidry without a jury and resulted in a judgment for plaintiff for $600.00. Because of the small amount awarded, no appeal was taken.

I represented all defendants and conducted the trial.

Plaintiffs were represented by Mr. Alfred S. Landry, 211 E. Main Street, New Iberia, LA 70560, 318-364-7626.

In addition to being an example of a number of environmental cases in which I was involved, the case presented the issue whether the strict liability imposed upon a landowner for activity conducted by him upon his land pursuant to Louisiana Civil Code Article 667 also applied to an independent contractor of the landowner who was performing a specialized service of which the landowner was not capable.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

Having been away from the practice ten years now, I have no independent recollection which would permit me to answer this question beyond the information furnished herein in answer to questions 17 and 18. The matters listed are typical of my legal activities.

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                              COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
CITATIONS LIST (Page 1)        Database: CTA5             Total Documents: 13

   1.   C.A.5 (La.) 1988.
 Mills v. Director, Office of Workers' Compensation Programs, U.S. Dept. of
 Labor   --- F.2d ----, 1988 WL 51991 (5th Cir.)

   2.   C.A.5 (La.) 1988.   Melancon v. Amoco Production Co.(Two Cases)
 834 F.2d 1238

   3.   C.A.5 (La.) 1987.   Molett v. Penrod Drilling Co.   826 F.2d 1419

   4.   C.A.5 (La.) 1987.   Brown v. Butler   815 F.2d 1054

   5.   C.A.5 (La.) 1987.   Amoco Production Co. v. Hodel   815 F.2d 352

   6.   C.A.5 (La.) 1987.
 St. Mary Iron Works, Inc. v. McMoran Exploration Co.   809 F.2d 1130

   7.   C.A.5 (La.) 1986.
 St. Mary Iron Works, Inc. v. McMoran Exploration Co.   802 F.2d 809

   8.   C.A.5 (La.) 1986.   U.S. v. Thier   801 F.2d 1463, 55 U.S.L.W. 2252
                              COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
CITATIONS LIST (Page 2)        Database: CTA5             Total Documents: 13

   9.   C.A.5 (La.) 1986.   Summit v. Blackburn   795 F.2d 1237

  10.   C.A.5 (La.) 1986.   Soileau v. Blackburn   789 F.2d 1209

  11.   C.A.5 (La.) 1986.
 Devin Tool & Supply Co., Inc. v. Cameron Iron Works, Inc.   784 F.2d 623

  12.   C.A.5 (La.) 1986.
 Berry v. Board of Sup'rs of Louisiana State University
 783 F.2d 1270, 42 F.E.P. CAS 917, 27 W.H. Cases 1143, 39 EPD P 35,964,
 30 Ed.Law Rep. 675

  13.   C.A.5 (La.) 1985.   Reed v. General Motors Corp.   773 F.2d 660
YOU ARE AT THE END OF THE CITATION LIST. PLEASE ENTER YOUR NEXT COMMAND.




                              COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                        Rank(R)         Page(P)         Database    Mode
--- F.2d ----                   R 1 OF 13       P 1 OF 9        CTA5        T
 1988 WL 51991 (5th Cir.)

                              O'Neal MILLS, Jr., Petitioner,
                                          v.
  DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF
        LABOR, McDermott, Incorporated and Crawford and Company, Respondents.
                                    No. 87-4464.
                             United States Court of Appeals,
                                    Fifth Circuit.
                                    June 13, 1988.
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Land based welder sought recovery of Longshore and Harbor Workers' Compensation Act benefits. The Benefits Review Board denied benefits, and petition for review was filed. The Court of Appeals, Duhe, District Judge, sitting by designation, held that land based welder was entitled to benefits.
Reversed and remanded.

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
834 F.2d 1238	R 2 OF 13	P 1 OF 41	CTA5	T

Daniel MELANCON, et al., Plaintiffs,
v.
AMOCO PRODUCTION CO., etc., Defendant-Appellant.
v.
BERAUD ENTERPRISES, INC., Third Party Defendant-Appellee.
Daniel MELANCON and Tressella Aymond Melancon, Plaintiffs-Appellants,
and
American General Fire & Casualty, Co., Intervenor-Appellant,
v.
AMOCO PRODUCTION CO., Defendant-Appellee.
Nos. 86-4491, 86-4859.
United States Court of Appeals,
Fifth Circuit.
Jan. 6, 1988.
As Amended on Denial of Rehearing March 22, 1988. (FN*)

FN* The Order amending this opinion is published at 841 F.2d 572.

Welder injured on offshore oil drilling platform brought action against oil production company for damages based on work-related injury. Insurer intervened. The United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., dismissed suit as barred by the Longshore and Harbor Workers' Compensation Act, and welder and intervenor appealed. The oil production company appealed dismissal of its indemnification claims. The Court of Appeals, Jerre S. Williams, J., held that: (1) welder was a "borrowed employee" of oil production company, and thus workers' compensation was his exclusive remedy under the Longshore and Harbor Workers' Compensation Act, and (2) oil production company was entitled to indemnification from lending employer.
Affirmed in part, reversed in part and remanded.

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834 F.2d 1238 R 2 OF 13 P 2 OF 41 CTA5 P

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation Rank(R) Page(P) Database Mode

826 F.2d 1419 R 3 OF 13 P 1 OF 48 CTA5 T

Bess Caroline MOLETT, Individually and on Behalf of her son, John Dreisch,
Plaintiffs.
v.
PENROD DRILLING CO., Defendant-Appellee.
GEARENCH, INC., Defendant-Third Party Plaintiff-Appellee-Appellant,
v.
COLUMBUS-McKINNON, INC., Third Party Defendant-Appellant.
No. 86-4665.
United States Court of Appeals,
Fifth Circuit.
Sept. 15, 1987.
Rehearing Denied Oct. 13, 1987.

Seller and manufacturer of defective chain appealed from order of the United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., entered in products liability action. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) evidence established that chain was defective; (2) accident occurring when chain broke was insufficiently connected to traditional maritime activity to invoke admiralty jurisdiction; (3) under Louisiana law, seller was entitled to recover from chain's manufacturer full amount it paid to plaintiffs in settlement of action; but

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826 F.2d 1419 R 3 OF 13 P 2 OF 48 CTA5 P

(4) District Court was required to determine whether settlement reached by seller was reasonable.

Affirmed and remanded.

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation Rank(R) Page(P) Database Mode
815 F.2d 1054 R 4 OF 13 P 1 OF 16 CTA5 T

Quenton N. BROWN, Petitioner-Appellant,
v.
Robert H. BUTLER, Sr., Warden, Louisiana State Penitentiary, Respondent-Appellee.
No. 86-4223
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
May 5, 1987.

State prisoner brought habeas corpus petition challenging his Louisiana conviction for armed robbery. The United States District Court for the Western

District of Louisiana, John M. Duhe, Jr., J., adopted magistrate's report and dismissed petition for abuse of writ, and appeal was taken. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) petitioner made his burden of proving no abuse of writ in connection with allegation that his privilege against self-incrimination was violated by testimony of state psychiatrist who failed to warn petitioner of his right to remain silent, and (2) petition was subject to dismissal on abuse of writ grounds in connection with allegation that petitioner was denied due process of law due to lack of insanity hearing.

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
815 F.2d 352	R 5 OF 13	P 1 OF 59	CTA5	T

AMOCO PRODUCTION COMPANY, Plaintiff-Appellant,
v.
Donald P. HODEL, Secretary of Department of the Interior, et al., Defendants-Appellees.
No. 86-4168.
United States Court of Appeals,
Fifth Circuit.
April 29, 1987.

Oil company brought action against Secretary of the Interior and related parties seeking declaratory and injunctive relief with respect to assessment of extra royalties and penalties due for gas produced and sold by company from gas lease on Outer Continental Shelf. The United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., 627 F.Supp. 1375, entered judgment against oil company, which appealed. The Court of Appeals, Randall, Circuit Judge, held that oil company's action was essentially claim against the United States for monetary relief in excess of $10,000 and, therefore, Claims Court has exclusive jurisdiction thereover.

Vacated and remanded with instructions.

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
809 F.2d 1130	R 6 OF 13	P 1 OF 17	CTA5	T

ST. MARY IRON WORKS, INC., Plaintiff-Appellee,
v.
McMORAN EXPLORATION CO., et al., Defendants,
Coburn Company of Lafayette, Inc., and Control Systematologists, Inc., Defendants-Appellants.
No. 86-4253.
United States Court of Appeals,
Fifth Circuit.
Feb. 3, 1987.

Chapter 11 debtor, who was general contractor in project to construct offshore crew living quarters unit, brought adversary proceeding to establish unsecured status of lienholders. The United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., upheld the bankruptcy court's decision concerning timeliness of lien filing. On rehearing, 802 F.2d 809, the Court of Appeals held that Louisiana Oil Well Liens Act, rather than Louisiana Private Works Act, governed perfection of materialman's or laborer's lien against immovable structure located in United States territorial waters adjacent to state of Louisiana.

Reversed and remanded.

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
802 F.2d 809	R 7 OF 13	P 1 OF 22	CTA5	T

ST. MARY IRON WORKS, INC., Plaintiff-Appellee,
v.
McMORAN EXPLORATION CO., et al., Defendants,
Coburn Company of Lafayette, Inc., and Control Systematologists, Inc.,
Defendants-Appellants.
No. 86-4253.
United States Court of Appeals,
Fifth Circuit.
Oct. 17, 1986.

Appeal was taken from decision of the United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., upholding bankruptcy court decision concerning timeliness of liens filed by unsecured creditors against offshore crew living quarters unit. The Court of Appeals, Robert Madden Hill, Circuit Judge, held that Louisiana Private Works Act, rather than Louisiana Oil Well Liens Act, governed perfection of materialmen's or laborer's lien against a movable structure located in United States territorial waters adjacent to state of Louisiana.

Affirmed in part, vacated in part and remanded.

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
801 F.2d 1463 55 U.S.L.W. 2252	R 8 OF 13	P 1 OF 49	CTA5	T

UNITED STATES of America, Plaintiff-Appellee,
v.
Richard H. THIER, Defendant-Appellant.
No. 85-4857.
United States Court of Appeals,
Fifth Circuit.
Oct. 10, 1986.
As Amended on Denial of Rehearing and Rehearing En Banc Jan. 27, 1987. (FN*)

FN* The Per Curiam Opinion amending this opinion is published at 809 F.2d 249.

Defendant charged with violating continuing criminal enterprise statute appealed from restraining order entered by the United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., freezing defendant's assets pending trial. The Court of Appeals, Clark, Chief Judge, held that ex parte restraining order freezing assets of defendant charged with violating continuing criminal enterprise statute until conclusion of his trial failed to comply with rule relating to preliminary injunctions.

Remanded with directions.

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Citation	Rank(R)	Page(P)	Database	Mode
795 F.2d 1237	R 9 OF 13	P 1 OF 27	CTA5	T

Wilby Frank SUMMIT, Petitioner-Appellant,
v.
Frank C. BLACKBURN, Warden, Louisiana State Penitentiary, Respondent-Appellee.
No. 86-4129.
United States Court of Appeals,
Fifth Circuit.
Aug. 7, 1986.

Defendant was convicted in the 15th Judicial District Court, Parish of Lafayette, of first-degree murder and sentenced to death. Defendant appealed. The Louisiana Supreme Court, 454 So.2d 1100, affirmed. Defendant sought federal habeas corpus relief. The United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., denied relief, but granted certificate of probable cause on one claim, and appeal was taken. The Court of

Appeals, E. Grady Jolly, Circuit Judge, held that defendant was denied effective assistance of counsel by failure of counsel to object to lack of corroborating evidence of attempted armed robbery which formed basis of aggravating felony needed for first-degree murder conviction.
Grant of certificate of probable cause reversed, application for probable cause denied in part and granted in part; judgment of district court reversed in part and remanded with instructions to enter conditional grant of writ of

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795 F.2d 1237 R 9 OF 13 P 2 OF 27 CTA5 P

habeas corpus.

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Citation	Rank(R)	Page(P)	Database	Mode
789 F.2d 1209	R 10 OF 13	P 1 OF 6	CTA5	T

Nason Gene SOILEAU, Petitioner-Appellant,
v.
Frank BLACKBURN, Warden, Louisiana State Penitentiary, et al., Respondents-Appellees.
No. 85-4699
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
May 21, 1986.

State prisoner petitioned for writ of habeas corpus. The United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., dismissed the petition, and prisoner appealed. The Court of Appeals, Politz, Circuit Judge, held that dismissal of petition on ground of delay required notice to petitioner and an opportunity to be heard, where magistrate relied on evidence outside the pleadings, placing matter in a summary judgment posture.
Vacated and remanded.

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Citation	Rank(R)	Page(P)	Database	Mode
784 F.2d 623	R 11 OF 13	P 1 OF 16	CTA5	T

DEVIN TOOL & SUPPLY COMPANY, INC., Plaintiff-Appellant Cross-Appellee,
v.

CAMERON IRON WORKS, INC., Defendant-Appellee Cross-Appellant.
No. 85-4197.
United States Court of Appeals,
Fifth Circuit.
March 10, 1986.

Buyer brought suit against seller for breach of sales contract; seller counterclaimed for loss due to cancellation. The United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., entered take-nothing judgments, and appeal was taken. The Court of Appeals held that: (1) contract did not provide seller with an unqualified immunity from liability for untimely delivery, and (2) contractual provision entitled seller only to "actual losses," not to customary cancellation changes, and therefore, in absence of evidence as to loss, if any, suffered by seller as result of buyer's cancellation, seller was not entitled to recover that contract provision.

Affirmed in part, reversed in part and remanded.

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Citation                    Rank(R)        Page(P)        Database   Mode
783 F.2d 1270               R 12 OF 13     P 1 OF 15      CTA5       T
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42 F.E.P. CAS 917, 27 W.H. Cases 1143, 39 EPD P 35,964, 30 Ed.Law Rep. 675

Dr. Julia Elizabeth BERRY, Plaintiff-Appellant,
v.
The BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY and Agriculture and Mechanical College, Dr. Martin D. Woodlin, et al., Defendants-Appellees.
No. 85-4217
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
March 5, 1986.

Associate professor of guidance counseling at state university brought suit against university officials alleging sex-based discrimination. The United States District Court for the Western District of Louisiana, W. Eugene Davis, J., granted summary judgment in favor of university. On appeal, the Court of Appeals, 715 F.2d 971, affirmed in part and reversed and remanded in part with directions. On remand, the United States District Court for the Western District of Louisiana, John M. Duhe, Jr., J., entered judgment for defendants, and professor appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) professor failed to establish continuing violation arising out of excessive work load, such as would extend into 180-day period actionable under Title VII, and (2) district court did not clearly err in finding that professor's professor's assignment was not comparable under Equal Pay Act standards with that of five male professors with whom she sought comparison for purposes of her claim that she was assigned excessive work load.

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Affirmed.

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                          COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                   Rank(R)          Page(P)          Database   Mode
773 F.2d 660               R 13 OF 13       P 1 OF 25        CTA5       T
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Patricia Loretta REED, Wife of/or David Reed, and Ardell Reed, Individually and
As Natural Tutrix and Administratrix of the Estate of Her Minor Son, Keith
Reed, Plaintiffs-Appellees,
v.
GENERAL MOTORS CORP., et al., Defendants,
Gerard Meche and Casualty Reciprocal Exchange, Defendants-Appellants.
No. 84-4613.
United States Court of Appeals,
Fifth Circuit.
Oct. 15, 1985.

Suit was brought seeking damages from an automobile driver and a truck driver arising out of an automobile accident. The United States District Court for the Western District of Louisiana, John M. Duhe, J., entered judgment against both drivers and their insurers, and automobile driver and his insurer appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) limits of insurance coverage of automobile driver was inadmissible under rule governing admissibility of evidence of insurance; (2) error in admission of evidence of limits of automobile driver's insurance coverage was not harmless even as to issue of his liability for damages arising out of an automobile accident; and (3) evidence was sufficient to establish that automobile driver's negligence in speeding and passing vehicles on the right shoulder of the road was a proximate cause of collision involving a truck driver, who was engaged in racing automobile driver, and another motorist.

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                          COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
773 F.2d 660               R 13 OF 13       P 2 OF 25        CTA5       P
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Reversed and remanded.

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                               COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
CITATIONS LIST (Page 1)          Database: LA-CS                 Total Documents: 25

   1.   La.App. 1 Cir. 1986.   Wadsworth v. Town of Berwick   484 So.2d 762

   2.   La.App. 1 Cir. 1985.   Richard v. Broussard   482 So.2d 729

   3.   La.App. 3 Cir. 1985.   Goulas v. Goulas   475 So.2d 134

   4.   La.App. 3 Cir. 1985.   C.H. Fenstermaker & Associates v. Regard
471 So.2d 1137

   5.   La.App. 3 Cir. 1985.   Chevalier v. Southern Silica   469 So.2d 387

   6.   La.App. 3 Cir. 1984.   Romero v. Romero   457 So.2d 317

   7.   La.App. 1 Cir. 1984.
Concrete Control Div., Inc. v. Cement Products Service, Inc.   457 So.2d 769

   8.   La.App. 3 Cir. 1983.   Dooley v. Dooley   443 So.2d 630

   9.   La.App. 3 Cir. 1983.   Dautreuil v. Degeyter   436 So.2d 614


                               COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
CITATIONS LIST (Page 2)          Database: LA-CS                 Total Documents: 25

  10.   La.App. 1 Dist. 1983.
Quintana Petroleum Corp. v. Alpha Investments Corp.   435 So.2d 1092

  11.   La.App. 3 Cir. 1983.   Goulas v. Goulas   426 So.2d 735

  12.   La.App. 3 Cir. 1983.   Boudreaux v. Pipe Line Technologists, Inc.
426 So.2d 747

  13.   La.App. 3 Cir. 1982.   Edmond v. Webre   413 So.2d 306

  14.   La. 1982.   State v. Frith   412 So.2d 1000

  15.   La.App. 3 Cir. 1982.
Southern-Gulf Marine Co. No. 9, Inc. v. Camcraft, Inc.   410 So.2d 1181

  16.   La.App. 1 Cir. 1981.   Moss v. Guarisco
409 So.2d 323, 1982-2 Trade Cases P 64,932

  17.   La.App. 1981.   Mitchell v. Dairyland Ins. Co.   405 So.2d 1233

  18.   La. 1981.   State v. Curry   400 So.2d 614
                               COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
CITATIONS LIST (Page 3)          Database: LA-CS                 Total Documents: 25

  19.   La. 1981.   State v. Scott   400 So.2d 627

  20.   La.App. 1981.   Melancon v. Durand   399 So.2d 742

  21.   La.App. 1981.   Batiste v. Iberia Parish School Bd.   401 So.2d 1224

  22.   La.App. 1980.
Sherville v. National Union Fire Ins. Co. of Pittsburg Pennsylvania
387 So.2d 1181
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  23.   La.App. 1980.   Simas v. Hicks   381 So.2d 949

  24.   La.App. 1979.   Melancon v. Durand   378 So.2d 580

  25.   La. 1905   SUCCESSION OF DELANEUVILLE v. DUHE   38 So. 20. 114 La. 62
YOU ARE AT THE END OF THE CITATION LIST. PLEASE ENTER YOUR NEXT COMMAND.
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Citation                         Rank(R)          Page(P)          Database   Mode
484 So.2d 762                    R 1 OF 25        P 1 OF 7         LA-CS      T
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Roy and Florence WADSWORTH
v.
TOWN OF BERWICK.
No. CA841229.
Court of Appeal of Louisiana, First Circuit.
Feb. 25, 1986.

Parents brought action against town to recover for injuries allegedly sustained by their minor child when she fell off slide in town park. The 16th Judicial District Court, Parish of St. Mary, John M. Duhe, Jr., J., entered summary judgment in favor of town, and parents appealed. The Court of Appeal, Grover L. Covington, C.J., held that town was not immune from liability, inasmuch as immunity statute applied only when injury-causing condition was of type normally encountered in true outdoors.

Reversed and remanded.

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                              COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                         Rank(R)          Page(P)          Database   Mode
482 So.2d 729                    R 2 OF 25        P 1 OF 28        LA-CS      T
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Ervin J. RICHARD, et ux.
v.
Floyd J. BROUSSARD, et ux.
No. CA 84 1172.
Court of Appeal of Louisiana, First Circuit.
Dec. 26, 1985.
Rehearing Denied Feb. 26, 1986.

Lessors of commercial property brought action against lessees as result of their vacating leased premises contrary to lease-purchase agreement. The Sixteenth Judicial District Court, Parish of St. Mary, John M. Duhe, Jr., J., rendered judgment in favor of lessors for unpaid rents and damages and assessed contractual attorney fees of 25%, and lessees took suspensive appeal. The Court of Appeal, Lanier, J., held that: (1) lessors did not terminate lease when they reoccupied leased premises and attempted to reestablish business; (2) lessors were entitled to recover expenses incurred in fixing two ice makers, freezer and vacuum cleaner; (3) lessors were entitled to recover amounts spent advertising to locate tenant for vacated premises; and (4) record did not support attorney fee.

Affirmed in part; reversed and remanded in part.

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                              COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                         Rank(R)          Page(P)          Database   Mode
475 So.2d 134                    R 3 OF 25        P 1 OF 14        LA-CS      T
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Maria GOULAS, Plaintiff-Appellee.
v.
Dale Joseph GOULAS, Defendant-Appellant.
No. 84-664.
Court of Appeal of Louisiana, Third Circuit.
Aug. 22, 1985.
Rehearing Denied Sept. 24, 1985.

After the Court of Appeal, 426 So.2d 735, had reversed and remanded action for rescission of sale of land on ground of lesion beyond moiety, finding evidence established that price given for land was less than one-half the value of land, the 16th Judicial District Court, Parish of St. Martin, John M. Duhe, Jr., J., rendered interlocutory decree establishing fair market value of the property at time of sale and ordering purchaser to exercise his option either to rescind sale or have it confirmed by paying full market value to vendor within 30 days. Purchaser appealed. The Court of Appeal, Yelverton, J., held that: (1) purchaser was not deprived of ingress and egress to remainder of property by reservation of usufruct for life in vendor of one-half acre fronting on highway, as statutes granted purchaser right of passage to highway, and (2) in calculating purchaser's value in naked ownership of property after finding that sale of land should be rescinded on ground of lesion beyond moiety, vendor's

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life expectancy at time of sale was properly used, rather than her life expectancy at time of hearing on remand.
Affirmed and remanded.

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Citation	Rank(R)	Page(P)	Database	Mode
471 So.2d 1137	R 4 OF 25	P 1 OF 11	LA-CS	T

C.H. FENSTERMAKER & ASSOCIATES, Plaintiff-Appellant,
v.
Joe REGARD & Dan Regard, Defendants-Appellees.
No. 84-543.
Court of Appeal of Louisiana, Third Circuit.
June 26, 1985.

One of three joint venturers brought action against the others claiming open account indebtedness for engineering and survey work. The others filed reconventional demands. The 15th Judicial District Court, Parish of Iberia, John M. Duhe, J., rejected both principal and reconventional demands, and all parties appealed. The Court of Appeal, Yelverton, J., held that: (1) evidence that parties agreed to provide their professional services to joint venture free of charge supported trial court's rejection of principal and reconventional demands, but (2) party who paid amount not actually due was entitled to recover that amount.
Affirmed in part; reversed in part; rendered.

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Citation Rank(R) Page(P) Database Mode

469 So.2d 387 R 5 OF 25 P 1 OF 9 LA-CS T

George CHEVALIER, Jr., Plaintiff,
v.
SOUTHERN SILICA, et al., Defendants,
Dove Equipment Company Defendant-Appellant,
and
Voorhies Supply Company, Inc., Defendant-Appellee.
No. 84-353.
Court of Appeal of Louisiana, Third Circuit.
May 15, 1985.

Worker's compensation claimant brought action against, inter alia, company and corporation who were alleged to be solidary obligors, and corporation moved for summary judgment in its favor. The Sixteenth Judicial District Court, Iberia Parish, John M. Duhe, Jr., J., granted corporation's summary judgment motion, and company appealed. The Court of Appeal, Domengeaux, J., held that: (1) where deposition was not filed into evidence, Court of Appeal could not address argument that deposition was not sufficient to warrant summary judgment, and (2) where defective sandblasting mask which allegedly caused claimant's injuries could have been supplied to claimant's employer prior to 1978, affidavit in support of summary judgment motion that indicated for period of 1978 through 1981 no sales of head masks or hoods for use in sandblasting were made by corporation, summary judgment was precluded.

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469 So.2d 387 R 5 OF 25 P 2 OF 9 LA-CS P

Reversed and rendered.

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
457 So.2d 317	R 6 OF 25	P 1 OF 16	LA-CS	T

Inez Hungerford ROMERO, Plaintiff-Appellant,
v.
Ray Emile ROMERO, Defendant-Appellee.
No. 83-915.
Court of Appeal of Louisiana, Third Circuit.
Oct. 10, 1984.

Former wife appealed from judgment entered by the 16th Judicial District Court, Parish of Iberia, John M. Duhe, Jr., J., in connection with partition of community property. The Court of Appeal, Yelverton, J., held that: (1) former wife was not entitled to reimbursement for mortgage payments on community home which she allegedly made from date of divorce until mortgage note was paid off

by former husband: (2) trial court adequately complied with statutory provisions in ordering partition by licitation of community home: and (3) property valued at only $9,000 compared to community's total assets of $142,000 was incorrectly ordered partitioned by licitation.
Affirmed as amended and case remanded.

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                    COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation              Rank(R)         Page(P)         Database   Mode
457 So.2d 769         R 7 OF 25       P 1 OF 11       LA-CS      T
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CONCRETE CONTROL DIVISION, INC.
v.
CEMENT PRODUCTS SERVICE, INC., et al.
No. 83 CA 1013.
Court of Appeal of Louisiana, First Circuit.
Oct. 9, 1984.

Cement subcontractor brought suit to recover sum for concrete delivered to contractor on street paving job for city. Contractor reconvened, claiming that concrete delivered by subcontractor did not meet strength requirements specified in contract. The 16th Judicial District Court, Parish of St. Mary, John M. Duhe, Jr., J., entered judgment in favor of subcontractor, and contractor appealed. The Court of Appeal, Savoie, J., held that: (1) subcontractor was entitled to recover for concrete it delivered to job; (2) contractor failed to prove that concrete was defective; and (3) since there was no evidence that parties ever even discussed, much less reached an agreement upon, an attorney fees clause, award of attorney fees pursuant to clause in delivery receipts that were signed by contractor's employees at job site was error.
Affirmed in part and reversed in part.
Shortess, J., concurred in part and dissented in part, and filed opinion.

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                    COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation              Rank(R)         Page(P)         Database   Mode
443 So.2d 630         R 8 OF 25       P 1 OF 9        LA-CS      T
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Doyle Paul DOOLEY, Plaintiff-Appellant,
v.
Paula Prince DOOLEY, Defendant-Appellee.
No. 83-253.
Court of Appeal of Louisiana, Third Circuit.
Nov. 9, 1983.
Writ Denied Jan. 6, 1984.

A judgment of the 16th Judicial District Court, Iberia Parish, John M. Duhe, Jr., J., made executory certain past due child support payments, and the husband appealed. The Court of Appeal, Yelverton, J., held that legal effect of reconciliation, being a termination of the separation, was to cause child to once more fall under parental authority of both parents, and order of child support, dependent on custody, likewise fell, and custody and support orders, having thereby terminated, could not be resurrected by subsequent return to living separate and apart, and same was true though support decree was independent of judgment of separation.
Reversed and rendered.

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                    COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation              Rank(R)         Page(P)         Database   Mode
436 So.2d 614         R 9 OF 25       P 1 OF 21       LA-CS      T
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CITATIONS LIST (Page 1)    Database: LA-CS                 Total Documents: 83

   1.   La.App. 3 Cir. 1986.   Moity v. Bodin   489 So.2d 474

   2.   La.App. 1 Cir. 1986.   Wadsworth v. Town of Berwick   484 So.2d 762

   3.   La.App. 1 Cir. 1985.   Richard v. Broussard   482 So.2d 729

   4.   La.App. 3 Cir. 1985.   Romero v. Mosquito Control Contractors, Inc.
480 So.2d 358

   5.   La.App. 3 Cir. 1985.   Herlitz Const. Co., Inc. v. Matherne
476 So.2d 1037

   6.   La.App. 1 Cir. 1985.
State, Dept. of Transp. & Development v. Sugarland Ventures, Inc.
476 So.2d 970

   7.   La.App. 3 Cir. 1985.   Goulas v. Goulas   475 So.2d 134

   8.   La.App. 3 Cir. 1985.   C.H. Fenstermaker & Associates v. Regard
471 So.2d 1137

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CITATIONS LIST (Page 2)    Database: LA-CS                 Total Documents: 83

   9.   La.App. 1 Cir. 1985.   State v. Williams   472 So.2d 277

  10.   La.App. 1 Cir. 1985.   State v. Williams   471 So.2d 255

  11.   La.App. 3 Cir. 1985.   Chevalier v. Southern Silica   469 So.2d 387

  12.   State v. Bartley   469 So.2d 51

  13.   La.App. 3 Cir. 1985.   Desormeaux v. Eastin   467 So.2d 115

  14.   La.App. 3 Cir. 1984.   Minor v. Robertson   461 So.2d 509

  15.   La.App. 3 Cir. 1984.   Lewis v. Dubre   461 So.2d 523

  16.   La.App. 3 Cir. 1984.   Decuir v. Sam Broussard, Inc.   459 So.2d 1375

  17.   La.App. 3 Cir. 1984.   State v. Lasseigne   461 So.2d 1196

  18.   La.App. 1 Cir. 1984.   Succession of Landry   460 So.2d 29

  19.   La.App. 3 Cir. 1984.   Romero v. Romero   457 So.2d 317
                           COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
CITATIONS LIST (Page 3)    Database: LA-CS                 Total Documents: 83

  20.   La.App. 1 Cir. 1984.
Concrete Control Div., Inc. v. Cement Products Service, Inc.   457 So.2d 759

  21.   La.App. 1 Cir. 1984.   Moss v. Guarisco   459 So.2d 1

  22.   La.App. 3 Cir. 1984.   Concrete Post-Tensioning, Inc. v. Armco, Inc.
449 So.2d 712

  23.   La.App. 3 Cir. 1983.   Huval v. 4 S Const. & Maintenance, Inc.
442 So.2d 1353
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24. La.App. 3 Cir. 1983. Charles v. Durand 442 So.2d 916

25. La.App. 3 Cir. 1983. State v. Breaux 441 So.2d 811

26. La.App. 1 Cir. 1983. Fromenthal v. Clark 442 So.2d 608

27. La.App. 3 Cir. 1983. State v. Henry 443 So.2d 657

28. La.App. 3 Cir. 1983. Dooley v. Dooley 443 So.2d 630

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CITATIONS LIST (Page 4) Database: LA-CS Total Documents: 83

29. La.App. 3 Cir. 1983. State v. Johnson 438 So.2d 1221

30. La.App. 1 Dist. 1983.
French Jordan, Inc. v. Oilfield Sales and Service, Inc. 439 So.2d 523

31. La.App. 3 Cir. 1983. Fredric Hayes, Inc. v. Rollins 435 So.2d 1151

32. La.App. 3 Cir. 1983. Dautreuil v. Degeyter 436 So.2d 614

33. La.App. 3 Cir. 1983. State v. Frith 436 So.2d 620

34. La.App. 1 Dist. 1983.
Quintana Petroleum Corp. v. Alpha Investments Corp. 435 So.2d 1092

35. La.App. 3 Cir. 1983. Lasseigne v. Dauterive 433 So.2d 334

36. La.App. 1 Dist. 1983. State v. Williams 432 So.2d 1003

37. La.App. 3 Cir. 1983. State v. Simone 428 So.2d 1226

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CITATIONS LIST (Page 5) Database: LA-CS Total Documents: 83

38. La.App. 3 Cir. 1983.
Louisiana Office of Family Services v. Administrator, Louisiana Office of Employment Sec. 427 So.2d 539

39. La.App. 3 Cir. 1983. Goulas v. Goulas 426 So.2d 735

40. La.App. 3 Cir. 1983. Boudreaux v. Pipe Line Technologists, Inc. 426 So.2d 747

41. La.App. 3 Cir. 1983. Cartez v. Delhomme 427 So.2d 521

42. La.App. 3 Cir. 1983. Jefferson v. Morton Salt Co. 427 So.2d 502

43. La.App. 3 Cir. 1982. Louviere v. Broussard 420 So.2d 1229

44. La.App. 1 Dist. 1982. Seymour v. Transocean Marine, Inc. 421 So.2d 325

45. La.App. 3 Cir. 1982. Boudreaux v. Verret 422 So.2d 1167

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CITATIONS LIST (Page 6) Database: LA-CS Total Documents: 83

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CITATIONS LIST (Page 1)     Database: CTA5               Total Documents: 40

   1.   C.A.5 (La.) 1988.
Mills v. Director, Office of Workers' Compensation Programs, U.S. Dept. of
Labor   --- F.2d ----, 1988 WL 51991 (5th Cir.)

   2.   C.A.5 (La.) 1988.   Amoco Production Co. v. Sea Robin Pipeline Co.
844 F.2d 1202

   3.   C.A.5 (La.) 1988.   Deshoteis v. SHRM Catering Services, Inc.
842 F.2d 116

   4.   C.A.5 (La.) 1988.   Melancon v. Amoco Production Co.(Two Cases)
834 F.2d 1238

   5.   C.A.5 (La.) 1987.   State of La. ex rel. Guste v. U.S.   832 F.2d 935

   6.   C.A.5 (La.) 1987.   Bartholomew v. CNG Producing Co.   832 F.2d 326

   7.   C.A.5 (La.) 1987.   Gauthier v. Continental Diving Services, Inc.
831 F.2d 559

   8.   C.A.5 (La.) 1987.   Warren v. Bergeron   831 F.2d 101
                            COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
CITATIONS LIST (Page 2)     Database: CTA5               Total Documents: 40

   9.   C.A.5 (La.) 1987.   Molett v. Penrod Drilling Co.   826 F.2d 1419

  10.   C.A.5 (La.) 1987.   Glass v. Butler   820 F.2d 112

  11.   C.A.5 (La.) 1987.   Lormand v. Superior Oil Co.   845 F.2d 536

  12.   C.A.5 (La.) 1987.   Coleman v. Butler   816 F.2d 1046

  13.   C.A.5 (La.) 1987.   Brown v. Butler   815 F.2d 1054

  14.   C.A.5 (La.) 1987.   Amoco Production Co. v. Hodel   815 F.2d 352

  15.   C.A.5 (La.) 1987.
St. Mary Iron Works, Inc. v. McMoran Exploration Co.   809 F.2d 1130

  16.   C.A.5 (La.) 1986.   Zeno v. Great Atlantic and Pacific Tea Co.
803 F.2d 178

  17.   C.A.5 (La.) 1986.   Guillory v. St. Landry Parish Police Jury
802 F.2d 822, 42 F.E.P. CAS 66, 42 EPD P 36,782, 1 IER Cases 926

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CITATIONS LIST (Page 3)     Database: CTA5               Total Documents: 40

  18.   C.A.5 (La.) 1986.
St. Mary Iron Works, Inc. v. McMoran Exploration Co.   802 F.2d 809

  19.   C.A.5 (La.) 1986.   U.S. v. Thier   801 F.2d 1463, 55 U.S.L.W. 2252

  20.   C.A.5 (La.) 1986.   Summit v. Blackburn   795 F.2d 1237

  21.   C.A.5 (La.) 1986.   Eaglin v. U.S., Dept. of Army   794 F.2d 981

  22.   C.A.5 (La.) 1986.   U.S. v. Stotts   792 F.2d 1318
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   23.   C.A.5 (La.) 1986.   Federal Deposit Ins. Corp. v. Langley
792 F.2d 547

   24.   C.A.5 (La.) 1986.   Federal Deposit Ins. Corp. v. Langley
792 F.2d 541

   25.   C.A.5 (La.) 1986.   Glass v. Blackburn   791 F.2d 1165

   26.   C.A.5 (La.) 1986.   Jarrell v. Chemical Dependency Unit of Acadiana
791 F.2d 373
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   27.   C.A.5 (La.) 1986.   Soileau v. Blackburn   789 F.2d 1209

   28.   C.A.5 (La.) 1986.   U.S. v. Guthrie   789 F.2d 356

   29.   C.A.5 (La.) 1986.   Wingo v. Blackburn   786 F.2d 654

   30.   C.A.5 (La.) 1986.
Devin Tool & Supply Co., Inc. v. Cameron Iron Works, Inc.   784 F.2d 623

   31.   C.A.5 (La.) 1986.
Berry v. Board of Sup'rs of Louisiana State University
783 F.2d 1270, 42 F.E.P. CAS 917, 27 W.H. Cases 1143, 39 EPD P 35,964,
30 Ed.Law Rep. 675

   32.   C.A.5 (La.) 1986.   Wingo v. Blackburn   783 F.2d 1046

   33.   C.A.5 (La.) 1986.   Bateman v. Johns-Manville Sales Corp.
781 F.2d 1132

   34.   C.A.5 (La.) 1986.   Fontenot v. Upjohn Co.
780 F.2d 1190, 54 U.S.L.W. 2383, 3 Fed.R.Serv.3d 1126
                               COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
CITATIONS LIST (Page 5)        Database: CTA5                 Total Documents: 40

   35.   C.A.5 (La.) 1985.   Reed v. General Motors Corp.   773 F.2d 660

   36.   C.A.5 (La.) 1985.   Diggs v. Hood   772 F.2d 190, 54 U.S.L.W. 2244

   37.   C.A.5 (La.) 1985.   Thibodeaux v. Arceneaux   768 F.2d 737

   38.   C.A.5 (La.) 1985.   In re Grand Jury Proceedings, Their   767 F.2d 1133

   39.   C.A.5 (La.) 1985.
In re U.S. Grand Jury Proceedings, Western Dist. of Louisiana, Cid
767 F.2d 1131

   40.   C.A.5 (La.) 1985.   Glass v. Blackburn   767 F.2d 123
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                               COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                         Rank(R)        Page(P)        Database    Mode
387 So.2d 1181                   R 22 OF 25     P 1 OF 14      LA-CS       T
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Joyce SHERVILLE et al
v.
NATIONAL UNION FIRE INSURANCE CO. of PITTSBURG, PENNSYLVANIA.
No. 13244.
Court of Appeal of Louisiana, First Circuit.
March 31, 1980.

Widow and daughter of deceased brought action against insurer of widow's son under manufacturer's and contractor's liability policy for death of deceased occurring when aluminum beam fell off insured's winch truck and struck deceased on head. The Sixteenth Judicial District Court, Parish of St. Mary, John M. Duhe, P. J., granted summary judgment to insurer, and widow and daughter appealed. The Court of Appeal, Watkins, J., held that clause in policy excluding bodily injury or property damage arising out of ownership, maintenance, operation, use, loading or unloading of automobile owned or operated by or rented or loaned to insured did not apply to preclude liability coverage for death of deceased.

Reversed and remanded.

On Rehearing

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                               COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                         Rank(R)        Page(P)        Database    Mode
381 So.2d 949                    R 23 OF 25     P 1 OF 12      LA-CS       T
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Paul SIMAS et al., Plaintiffs-Appellants,
v.
John W. HICKS, Defendants-Appellees.
No. 7512.
Court of Appeal of Louisiana, Third Circuit.
March 5, 1980.

Plaintiffs filed action for damages against defendant who was alleged to reside in Beaumont, Texas, and exception based on lack of personal jurisdiction was filed by son of defendant which alleged that defendant had died in France and that he had never been domiciled in St. Martin Parish, Louisiana. The 16th Judicial District Court, Parish of St. Martin, John M. Duhe, J., dismissed lawsuit and denied plaintiffs' motion for new trial, and plaintiffs appealed. The Court of Appeal, Laborde, J., held that: (1) trial court did not abuse discretion in denying new trial based upon ground that plaintiffs' counsel was never notified of date set for exception based on lack of personal jurisdiction, but (2) plaintiffs would be allowed opportunity to amend their petition to cure defects.

Reversed and remanded.

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                               COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                         Rank(R)        Page(P)        Database    Mode
378 So.2d 580                    R 24 OF 25     P 1 OF 8       LA-CS       T
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Lawrence P. MELANCON et al., Plaintiffs-Appellants,
v.
Beatrice DURAND et al., Defendants-Appellees.
No. 7309.
Court of Appeal of Louisiana, Third Circuit.
Dec. 19, 1979.

In suit for breach of alleged contract to lease farm land, the 16th Judicial District Court, Parish of St. Martin, John M. Duhe, Jr., J., granted

defendants' motion for summary judgment, and plaintiffs appealed. The Court of Appeal, Yelverton, J., held that there existed genuine issues of material fact, precluding summary judgment, as to whether there was a verbal lease.
Reversed and remanded.

Tenants of farmland appealed for decision of the trial court, which granted landowners' and usufructuary's motion for summary judgment in suit by tenants alleging breach of the lease. The Court of Appeals, 378 So.2d 580, reversed and remanded. On remand, after trial on the merits, the 16th Judicial District Court, Parish of St. Martin, John M. Duhe, Jr., J., entered judgment for defendants, and tenants appealed. The Court of Appeal, Laborde, J., held that trial court was not clearly wrong in concluding that tenants did not obtain a third lease, either written or oral, at the expiration of the second lease, and that they did not prove by a preponderance of the evidence any damages resulting from usufructuary's refusal to allow them to conduct farming operations on her land after the expiration of the second lease and the two-year period during which the second lease was tacitly reconducted.
Affirmed.

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Citation Rank(R) Page(P) Database Mode
401 So.2d 1224 R 21 OF 25 P 1 OF 25 LA-CS T

Walter J. BATISTE, Sr., et al., Plaintiffs and Appellants.
v.
IBERIA PARISH SCHOOL BOARD et al., Defendants and Appellees.
No. 3149.
Court of Appeal of Louisiana, Third Circuit.
May 27, 1981.

Father of 11-year-old elementary student, who was stabbed in the eye with ballpoint pen, sued school board, its insurer, principal and teachers at school, administrators of estate and parents of three other children allegedly involved in the stabbing. The 16th Judicial District Court, Parish of Iberia, John M. Duhe, Jr., J., directed verdict in favor of one teacher, entered judgment against the defendant parents, and denied the claim against the school board, its insurer, the principal and the other teacher, and plaintiff appealed and the defendant parents also appealed. The Court of Appeal, Culpepper, J., held that: (1) plaintiff failed to show negligence of teacher or principal or that stabbing was a foreseeable action which could have been prevented with increased supervision; (2) parents of minor who did the stabbing were liable for the tortious act of their child; (3) where two other defendants' sons had held plaintiff's son but it was only after they had released him that he was struck in the eye by another boy, it was not reasonably foreseeable by the

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401 So.2d 1224 R 21 OF 25 P 2 OF 25 LA-CS P

defendants' sons that such an injury would result and defendants were not liable for it; and (4) lowest award which district court could have reasonably made for the loss of sight in eye was $90,000.
Reversed in part, remanded in part, and affirmed in part.

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Citation	Rank(R)	Page(P)	Database	Mode
400 So.2d 627	R 19 OF 25	P 1 OF 21	LA-CS	T

STATE of Louisiana
v.
Marvin Elwood SCOTT.
STATE of Louisiana
v.
Winifred Ellen SCOTT.
Nos. 80-KA-2845, 80-KA-2846.
Supreme Court of Louisiana.
June 22, 1981.

Defendants were convicted in the Sixteenth Judicial District Court, Parish of St. Mary, John M. Duhe, Jr., J., of cruelty to a juvenile. They appealed. The Supreme Court, Watson, J., held that: (1) trial court erred reversibly with respect to one defendant in refusing to compel production of records of Department of Health and Human Resources; (2) trial court did not err in failing to sever trials; (3) trial court properly refused to suppress statements made by defendants at home and statements made by one defendant enroute to and at hospital; (4) five photographs of defendants' child showing nature of his burns were admissible; (5) trial court did not err in curtailing defense counsel's closing argument; (6) evidence was sufficient to sustain one defendant's conviction; and (7) five-year sentence at hard labor imposed on one defendant was not excessive.

Reversed in part; affirmed in part.
Blanche, J., dissented with reasons.
Ponder, J. ad hoc, dissented.

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Citation	Rank(R)	Page(P)	Database	Mode
399 So.2d 742	R 20 OF 25	P 1 OF 10	LA-CS	T

Lawrence P. MELANCON et al., Plaintiffs-Appellants.
v.
Beatrice DURAND et al., Defendants-Appellees.
No. 8122.
Court of Appeal of Louisiana, Third Circuit.
May 27, 1981.

Court of Appeal of Louisiana, First Circuit.
Oct. 12, 1981.

Appeal was taken from judgment entered by the Sixteenth Judicial District Court, Parish of St. Mary, John M. Duhe, J., sustaining exception of prescription and dismissing suit for passenger's injuries sustained when door of pickup truck suddenly popped open causing her to fall to street. The Court of Appeal, Chiasson, J., held that under article providing prescriptive period of one year, crucial date is day damage was sustained, not day upon which allegedly negligent conduct occurred.

Reversed and remanded.

STATE of Louisiana
v.
Kim John CURRY (two cases).
Nos. 80-K-2681, 81-KA-0275.
Supreme Court of Louisiana.
June 22, 1981.

In the Sixteenth Judicial District Court, Parish of St. Mary, John M. Duhe, Jr., J., one defendant pleaded guilty to charge of possession of methamphetamines, subject to his appeal of refusal of motion to suppress, and a second defendant was found guilty of possession of marijuana after a motion to suppress was denied and his application for writs was granted. The two cases were consolidated. The Supreme Court, Ponder, J. ad hoc, held that: (1) where officers received bulletin describing one of men involved in robbing and shooting of cab driver as wearing blue jeans and blue jean jacket and second man as wearing blue jeans and red checked shirt and later bulletin stated that the taxicab had been found abandoned in designated municipality, officers who later in the same day saw man with red checked shirt and man with blue jacket in that municipality had probable cause to arrest the men and hold them for sheriff's office and the lawful arrest justified search of the men, and (2) where sentence was result of plea bargaining culminating in guilty plea with

sentence to be given understood and agreed to, failure of trial judge to articulate reasons for the maximum sentence imposed, as required by statute, did not warrant new trial, but case would be remanded for sentencing in accord with the statute.

Conviction affirmed but sentence vacated and set aside and case remanded for resentencing in one case and in the second case the conviction and sentence affirmed.

Reversed and remanded.

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Citation                    Rank(R)        Page(P)        Database    Mode
409 So.2d 323               R 16 OF 25     P 1 OF 44      LA-CS       T
 1982-2 Trade Cases P 64,93
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William J. MOSS, et al
v.
Anthony J. GUARISCO, Sr., et al.
William J. MOSS
v.
Anthony J. GUARISCO, Sr., et al.
Nos. 14395, 14396.
Court of Appeal of Louisiana, First Circuit.
Dec. 22, 1981.
Rehearing Denied Feb. 18, 1982.

In consolidated suits alleging breach of contract, inducement to breach contract, and illegal conspiracy in restraint of trade, plaintiffs appealed from an order of the Sixteenth Judicial District Court In and For the Parish of St. Mary, John M. Duhe, Jr., J., sustaining a peremptory exception of no cause of action in favor of all defendants but one. The Court of Appeal, Lottinger, J., held that: (1) no cause of action for tortious inducement to breach of contract exists in Louisiana; (2) plaintiffs did not sufficiently allege an illegal restraint of trade in commerce since it was not alleged that the sale of automobiles in the city was impaired by defendants' actions; thus, since no

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409 So.2d 323               R 16 OF 25     P 2 OF 44      LA-CS       P
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viable offense or quasi-offense was alleged, no conspiracy could have occurred that might subject defendants to civil liability as joint tort-feasors under Civil Code article pertaining to liability for causing another person to do an unlawful act or assisting or encouraging such act; and (3) specific performance as a remedy was only available against that defendant who was a party to automobile dealership buy-sell agreement.

Affirmed and remanded.

Ponder, J., filed a dissenting opinion.

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Citation                    Rank(R)        Page(P)        Database    Mode
405 So.2d 1233              R 17 OF 25     P 1 OF 4       LA-CS       T
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Peggy Ann MITCHELL
v.
DAIRYLAND INSURANCE COMPANY, et al.
No. 14354.

Fred C. WEBRE, Defendant & Appellee.
No. 8706.
Court of Appeal of Louisiana, Third Circuit.
April 14, 1982.

Lessee brought action against lessor for damages for breach of an agricultural lease by allegedly allowing a third party to destroy lessee's second and third-year sugar cane stubble. The 16th Judicial District Court for the Parish of St. Martin, John M. Duhe, Jr., J., entered judgment sustaining lessor's exception of improper venue, and lessee appealed. The Court of Appeal, Culpepper, J., held that where lessee's petition alleged a claim for wrongful eviction against lessor for allowing another to go on property and plow lessee's sugar cane crop under, as well as facts stating a claim for breach of contract, action could properly be brought in parish in which wrongful act occurred as well as parish in which lessor resided.

Reversed and remanded.

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Citation	Rank(R)	Page(P)	Database	Mode
412 So.2d 1000	R 14 OF 25	P 1 OF 22	LA-CS	T

STATE of Louisiana
v.
Jarrell Delano FRITH.
No. 81-KA-1453.
Supreme Court of Louisiana.
April 5, 1982.

Defendant was convicted in the 16th Judicial District Court, Parish of St. Martin, John M. Duhe, Jr., J., of attempted aggravated rape of his seven-year-old niece, and he appealed. The Supreme Court, Burrell J. Carter, J. ad hoc, held that trial court improperly restricted voir dire by refusing to allow defense counsel to ask jurors how they felt about a defendant who does not testify, and such error was reversible.

Reversed and remanded.

Blanche and Watson, JJ., dissented.

Lemmon, J., dissented and will assign reasons.

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Citation	Rank(R)	Page(P)	Database	Mode
410 So.2d 1181	R 15 OF 25	P 1 OF 11	LA-CS	T

SOUTHERN-GULF MARINE CO. NO. 9, INC., Plaintiff-Appellant,
v.
CAMCRAFT, INC., Defendant-Appellee.
No. 8621.
Court of Appeal of Louisiana, Third Circuit.
Feb. 3, 1982.

In suit for breach of contract to furnish a ship, the 16th Judicial District Court, Parish of St. Martin, John M. Duhe, Jr., J., sustained defendant's peremptory exception of no cause of action based on plaintiff's lack of corporate existence at time of entering into the contract and plaintiff's subsequent incorporation under laws of a sovereign different from that represented in the contract, and plaintiff appealed. The Court of Appeal, Third Circuit, Doucet, J., held that defendant was estopped from asserting plaintiff's lack of corporate capacity at time contract was executed where plaintiff's de facto status did not affect any substantial rights of defendant.

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Citation	Rank(R)	Page(P)	Database	Mode
426 So.2d 735	R 11 OF 25	P 1 OF 13	LA-CS	T

Maria GOULAS, Plaintiff-Appellant.
v.
Dale Joseph GOULAS, Defendant-Appellee.
No. 82-487.
Court of Appeal of Louisiana, Third Circuit.
Feb. 3, 1983.

Vendor sued purchaser for rescission of a sale of land on ground of lesion beyond moiety. The 16th Judicial District Court, Parish of St. Martin, John M. Duhe, Jr., J., dismissed and vendor appealed. The Court of Appeal, Yelverton, J., held that: (1) the trial court erred in considering a usufruct for life retained by the vendor over one-half acre of the property as additional consideration, since vendor already owned that half acre and the act of sale merely retained or reserved the usufruct to herself, conveying only naked ownership; (2) clear and convincing evidence established that $200 price given for the land was less than one-half the value of the land; and (3) the defense that the sale was in reality a donation in disguise was an affirmative defense which was required to be specially pleaded.

Reversed and remanded.

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Citation	Rank(R)	Page(P)	Database	Mode
426 So.2d 747	R 12 OF 25	P 1 OF 9	LA-CS	T

Michael Craig BOUDREAUX, Plaintiff-Appellant.
v.
PIPE LINE TECHNOLOGISTS, INC., et al., Defendant-Appellee.
No. 82-513.
Court of Appeal of Louisiana, Third Circuit.
Feb. 3, 1983.

Action was brought to recover on theory that defendants' negligence caused plaintiff to fall from scaffolding which was attached to drilling rig platform and which gave way. The 16th Judicial District Court, Parish of Iberia, John M. Duhe, Jr., J., granted summary judgment to defendant construction company, and plaintiff appealed. The Court of Appeal, Yelverton, J., held that genuine issue of material fact as to whether the company provided roustabouts, who aided in installation of scaffolding and its railings, precluded summary judgment for company.

Reversed and remanded.

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Citation	Rank(R)	Page(P)	Database	Mode
413 So.2d 306	R 13 OF 25	P 1 OF 13	LA-CS	T

Murphy EDMOND, Plaintiff & Appellant,
v.

Leroy "Lee" J. DAUTREUIL, et al., Plaintiffs-Appellants-Appellees.
v.
Larry C. DEGEYTER, et al., Defendants-Appellees-Appellants.
No. 83-68.
Court of Appeal of Louisiana, Third Circuit.
June 29, 1983.

Owner of servient estate brought action against owner of dominant estate for declaratory judgment obligating owner of dominant estate to pay for improvements to servitude of passage made by owner of servient estate. The 16th Judicial District Court, Parish of Iberia, John M. Duhe, Jr., J., reformed servitude agreement to provide that parties share cost of improving servitude regardless of when or by whom it was improved, and both parties appealed. The Court of Appeal, Cutrer, J., held that language of servitude agreement could not be interpreted to obligate owners of dominant estate to pay for partial improvement of servitude which did not enure to benefit of dominant estate.

Reversed and rendered.

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Citation                  Rank(R)        Page(P)        Database   Mode
435 So.2d 1092            R 10 OF 25     P 1 OF 42      LA-CS      T
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QUINTANA PETROLEUM CORPORATION
v.
ALPHA INVESTMENTS CORPORATION, et al.
No. 82 CA 0936.
Court of Appeal of Louisiana, First Circuit.
June 28, 1983.
Rehearing Denied Aug. 23, 1983.

Concursus proceeding was brought to determine ownership of 25% mineral interest in certain lands. Three impleaded parties moved for summary judgment contending they were owners of the 25% mineral interest in the proportions of 45%, 45%, and 10% respectively. The Sixteenth Judicial District Court, Parish of St. Mary, John M. Dune, Jr., J., granted motion, and appeal was taken. The Court of Appeal, Lanier, J., held that: (1) substantial fact issue existed as to whether contested contract was contract of sale or agreement to sale precluding summary judgment; (2) substantial fact issue existed as to whether difference in description of mineral interests contained in contested contract and description of interest attached to writ of fieri facias were mutually inclusive precluding summary judgment on issue of whether party could have validly seized residue pursuant to writ; and (3) substantial fact issue existed concerning validity of conveyance precluding summary judgment.

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435 So.2d 1092            R 10 OF 25     P 2 OF 42      LA-CS      P
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Reversed and remanded.

46. La.App. 3 Cir. 1982. Domingues Motors, Inc. v. Lalonde
417 So.2d 900

47. La.App. 3 Cir. 1982. Naquin v. Singleton 416 So.2d 1331

48. La.App. 3 Cir. 1982. Sigue Trucking, Inc. v. Insured Lloyds
417 So.2d 97

49. La.App. 3 Cir. 1982. Harper v. Boudreaux 415 So.2d 648

50. La.App. 1 Dist. 1982. Woods v. Petroleum Helicopters, Inc.
415 So.2d 978

51. La.App. 1 Dist. 1982. Leger v. Cargill, Inc. 415 So.2d 983

52. La.App. 3 Cir. 1982. Edmond v. Webre 413 So.2d 306

53. La. 1982. State v. Frith 412 So.2d 1000

54. La.App. 3 Cir. 1982. Noel v. Demouchette 410 So.2d 1291

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55. La.App. 3 Cir. 1982.
Southern-Gulf Marine Co. No. 9, Inc. v. Camcraft, Inc. 410 So.2d 1181

56. La.App. 1 Cir. 1981. Moss v. Guarisco
409 So.2d 323, 1982-2 Trade Cases P 64,932

57. La.App. 1981. Aloise v. Jones 407 So.2d 477

58. La.App. 1981. Beyer v. F & R Oilfield Contractors, Inc.
407 So.2d 15

59. La.App. 1981. Mitchell v. Dairyland Ins. Co. 405 So.2d 1233

60. La.App. 1981. Alvarez v. Hub City Iron Works, Inc. 405 So.2d 590

61. La.App. 1981. Johnson v. Johnson 405 So.2d 639

62. La. 1981. Hebert v. Brazzel 403 So.2d 1242

63. La.App. 1981. Benoit v. Phillips Iron Works, Inc. 401 So.2d 557

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CITATIONS LIST (Page 8) Database: LA-CS Total Documents: 83

64. La. 1981. State v. Curry 400 So.2d 614

65. La. 1981. State v. Scott 400 So.2d 627

66. La.App. 1981. Melancon v. Durand 399 So.2d 742

67. La.App. 1981. Batiste v. Iberia Parish School Bd. 401 So.2d 1224

68. La.App. 1981. Ditch v. Finkelstein 399 So.2d 1216

69. La.App. 1981. Pierrotti v. Associated Indem. Corp. 399 So.2d 679

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   70.   La.App. 1981.   Reed v. Kroger Co.   400 So.2d 1106

   71.   La. 1981.   State v. Liner   397 So.2d 506

   72.   La.App. 1981.   LeBlanc v. Robertson   396 So.2d 993

   73.   La.App. 1980.   American Discount Corp. v. Glover   391 So.2d 853

   74.   La.App. 1980.   Hebert v. Brazzel   393 So.2d 135
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   75.   La.App. 1980.   Esta v. Dover Corp.   385 So.2d 439

   76.   La.App. 1980.
 Sherville v. National Union Fire Ins. Co. of Pittsburg Pennsylvania
 387 So.2d 1181

   77.   La.App. 1980.   Simas v. Hicks   381 So.2d 949

   78.   La.App. 1980.   Lasseigne v. Perpetuate Testimony   381 So.2d 952

   79.   La.App. 1979.   Hanagriff's Mach. Shop, Inc. v. Slaw Const. Co., Inc.
 380 So.2d 146

   80.   La.App. 1979.   Melancon v. Durand   378 So.2d 580

   81.   La.App. 1979.   Johnson v. Morton Salt Co.   377 So.2d 549

   82.   La. 1942   STATE v. DUHE   9 So.2d 517, 201 La. 192

   83.   La. 1905   SUCCESSION OF DELANEUVILLE v. DUHE   38 So. 20, 114 La. 62
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JURY WISDOM

By Judge John Duhe
United States District Court
Western District Louisiana

During the ten years I have served as a judge, I have made a "study" of juries and what they like and do not like. The study, of course, is unscientific. It has consisted of random questions asked to jurors at the close of trials. The questions have not always been the same; I simply have tried to make the inquiries which I felt were appropriate to the particular case and the particular jury. However, I feel comfortable in drawing from my talks with the jurors some conclusions as to what they like and do not like, what persuades them and what does not, or, in sum, what is effective presentation of evidence and what is not.

My first observation is that the relationships with the judge play an important role. As many lawyers know, jurors relate more easily to the judge. When they arrive at the courthouse for jury duty, they are apprehensive and ill at ease. One of the first persons they see is the fellow with the robe, the judge who usually makes them feel at ease. They quickly develop the feeling that the judge is their friend at a time when, as apprehensive jurors, they really need one. As the trial commences, they become aware that the judge is the obvious authority figure, and that he will protect and advise them during the trial.

This makes the counsel's relationship with the judge important. To the extent possible, counsel should avoid being "called down" or "fussed at" by the judge. Most of us who serve as judges are aware of this and try to avoid unnecessary criticism of counsel, but, of course, we are all human, and it frequently occurs. It can be damaging to the client. In short, trial counsel's relationship with the judge should be as good as you can make it under the circumstances.

Trial counsel should try to make the jurors like him. Counsel's job is persuasion, and persons are more easily persuaded by those they like. Thus anything which could affect a juror's perception of you is important — clothes, personal habits, demeanor, and delivery. Most of the comments which follow are elaborations upon this general theme — counsel's job is to make the jury like him, so that he can more effectively persuade them.

One point which many lawyers overlook is that jurors are *very* territorial. Don't reach across the rail or stand too close to the jury box; that is "their space" and they do not like your invading it.

Preparation and organization are, of course, important. Jurors are always more impressed by — and thus more successfully convinced by — the better prepared and better organized lawyer. This factor is more important if one side of the case is presented well and the other is not. It is less of a factor if both sides of the case are either well or poorly presented.

JOHN M. DUHE, JR., has served as a federal judge since 1984. He previously served as a judge of the 16th Judicial District Court. He is a graduate of the Tulane Law School, and practiced law in New Iberia before his elevation to the bench. This article captures some of his remarks as a guest speaker at the LADC's 24th annual meeting in Vancouver earlier this month.

Jurors always say that the opening statement was the most important thing the lawyers did during the trial. There are some logical reasons why this is so. The opening statement comes at a time when the jurors are fresh and anxious, but they have lost some of their initial anxiety. The attorneys are also fresh and have prepared their opening statements in advance, so the presentations usually are better organized.

On the subject of opening statements, you can be certain that jurors remember what you promise them. Whether you couch your opening statements in terms of a "contract" or not, it makes no difference to the jury; they invariably will remember that a lawyer did not produce the evidence he told them in the opening statement that he would produce.

Jurors consistently tell me that the closing argument is the least important thing the lawyers do. One reason may be that the jurors' minds have been made up before that time. Another is that the jurors are tired and less receptive. In most cases, the closing argument is not as well organized or prepared as the opening statement. I recommend that lawyers prepare the closing argument in advance of trial; it can serve as a "checklist" for the evidence you must introduce, and can be adapted to reflect the changes that occur during the trial.

The major complaint of jurors is that lawyers waste their time. The most serious offender is the lawyer who asks repetitious questions. Jurors perceive that he is "talking down" to them, and they are offended. Of course, a lawyer repeats a question to assure that his point is made. However, repetitious questioning is the least effective way to do so. The clarity of the question is more effective because it is less damaging than repetition. Another way is to use more than one witness to establish a given point; this, however, may provoke a valid objection that the testimony is "cumulative."

Jurors also abhor unnecessary questions. However, since their view of what is "necessary" is unusual, counsel should try to ask as few questions as possible. One veteran trial lawyer who realizes this has developed a successful approach. When he is one of multiple defendants, he positions himself at the end of counsel table, and is the last to ask questions. Since other defense counsel may bring out most of his points in their questioning, he usually is then in a position to ask the witness only one or two questions, or to say "no questions," usually to the delight of the jury.

Jurors despise the argumentative question. They do not know what it is called, but they know they do not like it. Get the facts which you need for your closing argument and stop.

The handling of exhibits is important. Jurors think an efficient lawyer should have each exhibit at his fingertips, and that he should mark it in advance.

In cultivating jurors, simplicity is the key. Imagine you are talking to a

(continued on page 4)

JURY WISDOM

(continued from page 3)

jury of cab drivers. Avoid lawyers words such as "duty," and use lay terms such as "responsibility." Avoid doctor and other expert words. "What is your prognosis, doctor?" is not nearly as effective for jurors as "Doctor, will Mr. Jones get better?"

Jurors complain that they know nothing about mechanical things, and they are not educated about the mechanical thing at issue until the middle of the trial. Use visual aids — photos or a blackboard — early in your presentation, and do not wait until your last witness — the expert — to explain to the jury what a jack-up barge or a set of tongs looks like.

The deposition is the least effective way of producing evidence. Jurors believe that the reading of a deposition is almost useless. They try to listen and evaluate, but the impact is missing. When a deposition is being read and the witness refers to an exhibit, pick up the exhibit, or point to it, while reading the deposition.

The videotaped deposition is much better than the written deposition, but it is not as convincing as live testimony. There are a number of reasons. One is that the witness usually is a poor actor; he looks down and shuffles papers, and all the juror sees is the top of his head. The audio is often of poor quality, with background noises such as a telephone ringing, or the witness' "beeper" going off. There often are interruptions for the witness to make a telephone call; the jurors then sense that the witness doesn't think that his testimony is very important. Perhaps another reason is that jurors generally believe that nothing on TV is true, since it usually is fiction. This thought may lead them — perhaps subconsciously — to discount video depositions.

The jury's reaction to an expert witness depends for the most part on how good a witness he is. His qualifications, his demeanor, the ease with which he is understood and his persuasiveness — in short, the same things that make a lawyer effective — dictate the jury's reaction to an expert.

A few observations can be made about particular experts. Jurors do not find convincing the testimony of vocational rehabilitation specialists. In short, they do not believe a

are many reasons. One is that the rehab specialist never finds the plaintiff a job, and never can say that a job positively is available at X company or Y company for this particular person. Perhaps the major reason is that jurors know that a disabled person cannot compete in the job market, and they do not need an expert to tell them so.

Economists fare a little better. Jurors are impressed by a good explanation of how to, and the reason why they must discount to present value. They have some confidence in what economists say; they do not always understand them but will follow the instructions. Jurors are aware of declining economic conditions and tend to put more faith in economists who address that issue in their direct examination.

The effectiveness of a physician-expert witness depends primarily on the manner of presentation. With safety experts, the qualifications of the witness are most important. Often the jury can understand the risks and alternatives on their own, and a safety expert is not really needed. In such a case, the ineffectiveness can be compounded by a safety expert whom the jury perceives is talking down to them.

"Perhaps another reason (the videotaped deposition is not as convincing as live testimony) is that jurors generally believe that nothing on TV is true, since it usually is fiction. This...may lead them – perhaps subconsciously – to discount video depositions."

How are jurors affected by the number of lawyers on each side? Some jurors take note of this and some do not. To those who take note, the reaction is mixed; some sense a "ganging up" on the side with the fewer lawyers but others pay no attention to the difference.

The presence of a local lawyer does not seem to matter in injury cases. Since the plaintiff usually is a local resident and most defendants are foreign, the jury does not think it unusual that the plaintiff is represented by a local lawyer and the defendant is not. In consitutional tort matters, however, the representation of the defendant by an out of town lawyer makes a really big difference.

Jurors like a preliminary explanation of the jury charges. They appear

the charge with them to the jury room is helpful. This may depend upon the nature of the case.

Any time you get the opportunity to interview a jury, take it. Ask them specific questions, such as why they did not believe a certain witness, or what they did or did not like about your cross examination. They will tell you, and their answers will be honest and, in some cases, brutally frank.

Finally, take every opportunity to hone your trial skills. Participate in a good trial advocacy program. Become a skilled trial lawyer, because there is one overriding observation from my ten years of studying jurors: better advocates generally are more successful with juries.

NEW MEMBERS

Michele D. Ahlers of Metairie
Michael P. Colvin of Baton Rouge
Gregory J. McDonald of New Orleans
William S. Penick of New Orleans
William V. Courtney of New Orleans
Patrick J. Hanna of Lafayette
Gary A. Hemphill of New Orleans
James C. McMichael, Jr., of Shreveport
Elizabeth Melancon of Agana, Guam
Patricia Hill Wilton of Baton Rouge
John Claiborne Young of Baton Rouge
Charles M. Raymond of New Orleans
Marshall M. Redmon of New Orleans
David M. Packard of Metairie
Theodore V. Fish, Jr., of New Orleans
John E. Heinrich of Baton Rouge
John A. Keller of Lafayette
Richard E. McCormack of New Orleans
Mary E. Thornton of Baton Rouge
Grier J. Gregory of Metairie
Brian Steele Lestage of DeRidder

NEED AN EXPERT?

The LADC's Expert Witness Service is available to members without charge. Contact the executive director, 330 Sunset Blvd., Baton Rouge, La., 70806.

If you have information on any experts which might be of interest to other members, you may share it with them by sending it to the executive director.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   I anticipate no receipts or benefits from any of the enumerated sources. I have no arrangements for future compensation for any financial or business interest except for dividends, interest, oil and gas royalties, and similar investment income from the assets listed on the attached financial statement.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I will recuse myself from participation in any case in which I or a family member or other business associate has any interest. The rules of the court require the disclosure of all parties at interest so that each judge can readily identify any potential conflict of interest and I shall avail myself of those rules. All appearance of impropriety will be avoided by recusal.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   None, except as noted in 1. above.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraris, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   See attached Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

   See attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   My campaign for election as Judge, Sixteenth Judicial District, State of Louisiana. No real campaign was undertaken since I was unopposed.

   My former law partner Patrick T. Caffery of New Iberia, Louisiana waged a successful campaign for United States Congress from the Third District of Louisiana. I held no position in his campaign but was occasionally involved in planning strategy.

AO-10
Rev. 8/87

FINANCIAL DISCLOSURE REPORT

Annual Report Due by May 15 from Judicial Officers and certain Judicial Employees (28 USCA App. I, §§ 301-09)

Person Reporting (Last name, first, middle initial): Duhe, John M., Jr.

Court or Organization: U. S. District Court
Western District of Louisiana

Date of Report: 6/27/88

Title: U. S. District Judge

Date of Entry/Nomination/Termination (only if initial or final report): June 27, 1988

Reporting Period (Calendar year, or inclusive dates): 1987

Home or office address:
Room 249, 705 Jefferson Street
Lafayette, LA 70501

IMPORTANT NOTES: *Please read the instructions accompanying this form. The report should include information pertaining to your spouse and dependent children, if any. Attach additional sheets if needed, identifying each attachment by showing your name, the date of the report, and the section(s) being completed.* **Complete all sections, checking the NONE box for each section where you have no reportable information.** *Compare and reconcile this report with last year's and list items in the same order as last year. Type or print clearly. Sign on last page.*

I. POSITIONS. *(Reporting individual only; see pp. 15-16 of Instructions.)*

☐ **NONE** (No reportable positions)

POSITION	NAME OF ORGANIZATION/ENTITY
Trustee	Weeks Trusts, 705 Jefferson St., Lafayette, LA
Manager & Partner	Duhe Land Company, Box 968, New Iberia, LA
Partner	Rochel & Duhe, New Iberia, LA

II. AGREEMENTS. *(Reporting individual only; see p. 17 of Instructions.)*

DATE	PARTIES AND TERMS

☒ **NONE** (No reportable agreements)

III. NON-INVESTMENT INCOME. *(Partial disclosure for spouse; see pp. 18-20 of Instructions.)*

☐ **NONE** (No reportable non-investment income)

	DATE (Honoraria only)	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1		Woman's Foundation, Inc. - Salary (S)	$
2			$
3			$
4			$
5			$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
John M. Duhe, Jr.	6/27/88

IV. REIMBURSEMENTS and GIFTS--transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

	SOURCE	DESCRIPTION
☐	NONE (No such reportable reimbursements or gifts)	
1	LADC Trial Advocacy Seminar	Reimbursement of lodging, mileage and meals.
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS. *(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
☒	NONE (No such reportable gifts)		
1			$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 22-24 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
☒	NONE (No reportable liabilities)		
1			
2			
3			
4			
5			
6			
7			

* VALUE CODES:
J = $0 to $1,000
K = $1,001 to $5,000
L = $5,001 to $15,000
M = $15,001 to $50,000
N = $50,001 to $100,000
O = $100,001 to $250,000
P = over $250,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
John M. Duhe, Jr.	6/27/88

VII. INVESTMENTS and TRUSTS--income, value, transactions. *(Includes those of spouse; partial disclosure for dependent children; see pp. 24-35 of Instructions.)*

A. Description of Assets (including trust assets)	B. Income during period		C. Gross value at end of period		D. Transactions during period (Reporting individual and spouse)				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure.	Amt. Code[1] (A-H)	Type (e.g., div.)	Value Code[2] (J-P)	Value Method Code[3] (Q-W)	Type (e.g., sold)	Date: Month-Day	Value Code[2] (J-P)	Gain Code[1] (A-H)	Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1 New Iberia Bank checking account	B	Int.	L	T					
2 American Discount Corp. debenture	B	Int.	L	T	This item erroneously shown as "note receivable" on prior reports.				
3 Evangeline Fed. Savings & Loan - checking acct.	C	Int.	M	T					
4 Est. J. Malcolm Duhe checking account	A	Int.	K	T					
5 City Bank & Trust checking account	C	Int.	M	T					
6 Guaranty Bank & Trust checking account	B	Int.	K	T					
7 Nuveen Trust bond fund	C	Int.	L	T					
8 Various Louisiana Bonds munic. bonds	B	Int.	K	T					
9 New Iberia Bank Corp. com. stock	B	Div.	L	T	Changed name from New Iberia National Bank.				
10 FNB Jeanerette com. stock	A	Div.	K	T					
11 City Bancorp com. stock	A	Div.	K	T					
12 Washington Life Ins. Co. com. stock	A	Div.	K	T					
13 Am. Discount Corp. com. stock	A	Div.	K	T					
14 debenture	B	Int.	L	T	This item erroneously not separately listed on prior reports. Value and income shown with report on stock.				
15									
16 Farm Bureau Fund mutual fund	B	Div. C.Gain	K	T					
17 J. Paulin Duhe, Inc. com. stock	A		M	U					
18 pref. stock	A		N	U	new issue	2/4	U	A	
19 La. Land & Exploration Co. - royalty trust	A		J	T	Will not be reported hereafter. Income & value below exempt level.				
20 Texaco oil & gas royalty	D	Roy.	L	W					

1 Income/Gain Codes:	A = exempt ($0 to $100)	B = $101 to $1,000	C = $1,001 to $2,500	D = $2,501 to $5,000
	E = $5,001 to $15,000	F = $15,001 to $50,000	G = $50,001 to $100,000	H = over $100,000
2 Value Codes:	J = exempt ($0 to $1,000)	K = $1,001 to $5,000	L = $5,001 to $15,000	M = $15,001 to $50,000
	N = $50,001 to $100,000	O = $100,001 to $250,000	P = over $250,000	
3 Value Method Codes:	Q = Appraisal	R = Cost (real estate only)	S = Assessed value	T = Cash/market
	U = Book value	V = Other	W = Estimated	

FINANCIAL DISCLOSURE REPORT (cont'd)	Name of Person Reporting	Date of Report
	John M. Duhe, Jr. p. 2	6/27/88

VII. INVESTMENTS and TRUSTS--income, value, transactions. *(Includes those of spouse; partial disclosure for dependent children; see pp. 24-35 of Instructions.)*

A. Description of Assets (including trust assets)	B. Income during period		C. Gross value at end of period		D. Transactions during period (Reporting individual and spouse)				
						If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	Amt. Code[1] (A-H)	Type (e.g., div.)	Value Code[2] (J-P)	Value Method Code[3] (Q-W)	Type (e.g., sold)	Date: Month-Day	Value Code[2] (J-P)	Gain Code[1] (A-H)	Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1 Est. Wm. Helis oil & gas royalty	B	Roy.	J	W					
Exxon oil & gas royalty	B	Roy.	J	W					
Ergon Oil oil & gas royalty	A	Roy.	J	T	Oil & gas lease expired.				
Koch Oil oil & gas royalty	A	Roy.	J	T	Oil & gas lease expired.				
Scurlock Oil Co. oil & gas royalty	A	Roy.	J	T					
Hawthorn Oil & Gas oil & gas royalty	A	Roy.	J	T	Oil & gas lease expired.				
Woodlands Townhouse rental property	D	Rent	M	W					
Est. J. Malcolm Duhe partnership-estate	A	Int.	K	W					
Duhe Land Co. partnership	D	Rent & Roy.	M	U					
Rochel & Duhe partnership	A		J	U	Will not be reported hereafter. Value & income below exempt level.				
World Life Ins. Co. IRA	A		L	U					
Land Coast Insul. Co. com. stock	A		M	W	This item erroneously not reported on prior reports because no dividend				
13					has ever been paid and no ready market exists for the stock.				
Wal U Investment com. stock	E		L	U	Inadvertently omitted from prior report.				
15									
16									
17									
18									
19									
20									

1 Income/Gain Codes:	A = exempt ($0 to $100) E = $5,001 to $15,000	B = $101 to $1,000 F = $15,001 to $50,000	C = $1,001 to $2,500 G = $50,001 to $100,000	D = $2,501 to $5,000 H = over $100,000
2 Value Codes:	J = exempt ($0 to $1,000) N = $50,001 to $100,000	K = $1,001 to $5,000 O = $100,001 to $250,000	L = $5,001 to $15,000 P = over $250,000	M = $15,001 to $50,000
3 Value Method Codes:	Q = Appraisal U = Book value	R = Cost (real estate only) V = Other	S = Assessed value W = Estimated	T = Cash/market

FINANCIAL DISCLOSURE REPORT (cont'd)	Name of Person Reporting John M. Duhe, Jr.	Date of Report 6/27/88

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. *(Indicate section of Report.)*

☐ **Check to affirm that differences in investments from those reported in prior year are exempt from disclosure.**

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

Signature John M. Duhe Jr.

Date June 28, 1988

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (28 U.S.C.A. APP. I, § 304, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

1. *Mail signed original and 4 additional copies to:*

   Judicial Ethics Committee
   Administrative Office of the
   United States Courts
   Washington, DC 20544

2. *Deliver one copy to the Clerk of the Court on which you sit or serve. (Judicial employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center, need not file a copy with any court.)*

PERSONAL FINANCIAL STATEMENT

Name John M. Duhe, Jr.
Address Rm. 249, 705 Jefferson St.
Lafayette, LA 70501

To: ____________________ BANK

I make the following statement of all my assets and liabilities as of the 1st day of May, 19 88, and give other material information for the purpose of obtaining credit with you on notes and bills bearing my signature, endorsement, or guarantee, and agree to notify you promptly of any change affecting my ability to pay.

(PLEASE ANSWER ALL QUESTIONS, USING "NO" OR "NONE" WHERE NECESSARY)

ASSETS	
1. Cash (See Sched. No. 1) On hand, and unrestricted in banks.	$ 95,700
2. U. S. Government Securities (Guaranteed)	-0-
3. Government Agencies Securities	22,000
4. Accounts and Loans Receivable (See Sched. No. 2)	1,500
5. Notes Receivable, Not Discounted (See Sched. No. 2)	-0-
6. Notes Receivable, Discounted (See Sched. No. 2) With banks, finance companies, etc.	-0-
7. Life Insurance, Cash Surrender Value (Do not deduct loans) (See Sched. No. 3)	25,000
8. Stock and Securities Other Than Guaranteed U. S. Gov't and Gov't Agencies (See Sched. No. 4)	256,860
9. Real Estate Registered in own name. (See Sched. No. 5)	165,000
10. Automobiles Registered in own name.	10,000
11. Other Assets (Itemize) See attached	119,000
12.	
13. Sub Total $	
14. Less Line No. 31 $	
15. Net Worth (To be shown on line no. 33) $	
16.	
17. TOTAL ASSETS	$ 695,060

LIABILITIES AND NET WORTH	
18. Notes Payable to Banks, Unsecured Direct borrowings only (See Sched. No. 1)	$ -0-
19. Notes Payable to Banks, Secured Direct borrowings only. (See Sched. No. 1)	-0-
20. Notes Receivable, Discounted (See Sched. No. 1) With banks, finance companies, etc.	-0-
21. Notes Payable to Others, Unsecured	-0-
22. Notes Payable to Others, Secured	-0-
23. Loans Against Life Insurance (See Sched. No. 3)	-0-
24. Accounts Payable	5,000
25. Interest Payable	-0-
26. Taxes and Assessments Payable (See Sched. No. 5)	-0-
27. Mortgage Payable on Real Estate (See Sched. No. 5)	100,000
28. Brokers Margin Accounts (See Sched. No. 7)	-0-
29. Other Liabilities (Itemize) Est. Taxes	25,000
30. Medical Exp.	3,000
31. Total Liabilities	133,000
32.	
33. Net Worth (From line no. 15)	$695,060
34. TOTAL LIABILITIES and NET WORTH (Line 31 plus line 33)	$562,060

SOURCE OF INCOME	
Salary	$ 89,500
~~Bonus and commissions~~ Interest	$ 5,000
Dividends	$ 800
Real Estate income & Royalty	$ 8,600
Other income – itemize	$ 1,200
TOTAL	$ 105,100

PERSONAL INFORMATION

Business or occupation U. S. District Judge Age 55

Partner or officer in any other venture
Duhe Land Co. (partner)
Rochel & Duhe (partner)

CONTINGENT LIABILITIES	
As endorser or co-maker	$ 900,000
On leases or contracts	$ -0-
Legal claims	$ -0-
Provision for Federal Income Taxes	$ -0-
Other special debt	$ -0-

GENERAL INFORMATION

Are any assets pledged? No

Are you defendant in any suits or legal actions? Yes

Have you ever made a composition settlement? Explain: No

Have you ever taken bankruptcy? Explain: No.

SUPPLEMENTARY SCHEDULES

No. 1 Banking Relations. (A list of all my bank accounts, including savings, and loans)

Name and Location of Bank	Cash Balance	Amount of Loan	Maturity of Loan	How Endorsed, Guaranteed, or Secured
Evangeline Fed. S & L	48,500	-0-		
City Bancorp	37,000	-0-		
New Iberia Bank	9,700	-0-		
Guaranty Bank & Trust	500	-0-		

See Other Side

PBT-036
Iberia Printing, Inc.

JOHN M. DUHE, JR.
FINANCIAL STATEMENT
May 1, 1988

OTHER ASSETS

Duhe Land Company (partnership)	$45,000
Est. J. M. Duhe (partnership)	1,000
Nuveen Bond Trust	22,000
Farm Bureau Growth Stock Fund	2,000
American Discount Corp. debenture	10,000
I.R.A.	11,000
Iberia Field Mineral Interest	11,000
Broussard Property	5,000
Sailboat	12,000
	$119,000

JOHN M. DUHE, JR.
FINANCIAL STATEMENT
May 1, 1988

STOCKS	# SHARES		VALUE
American Discount Corp.	1,822		$2,000
City Bankcorp, Inc. of N.I.	60		2,700
First National Bankcorp, Jean.	16		4,560
Iberia Golf Club	1		500
J. Paulin Duhe, Inc.	25	common	100,000
	709	preferred	70,000
Land Coast Insulation	25,000		50,000
New Iberia Nat'l. Bankcorp	135		20,250
Washington Life Ins. Co.	333		1,250
Val U Investment Co.	12,500		5,600
			$256,860

BONDS	
Baton Rouge Sewer Dist.	2,000
Jefferson Parish Drainage Dist.	20,000
	$22,000

NAME	POLICY #	POLICY TYPE	BENEFICIARY	AMOUNT
Washington Life $127.50 Six months	9285-1104	Universal Life; Benefit increases annually; premium remains the same	Gloria, primary; children, share & share alike	$55,000
CM Life Ins. Co.	20070718770	Flex. Prem. Adjustablie Life	Gloria, primary beneficiary; children share & share alike, secondary benef.	$125,000
New York Life Insurance $237.88 Six months	96318	Group Life Ins. Cert. issued to Am. Bar Endowment (membership 26418200) decreasing term ins.	Gloria, primary	current $40,000
Federal Empl. Group Life Ins. $128.54 per month		Whole life coverage on a group basis	Gloria, primary; children, share & share alike, secondary	$156,000

In addition to the foregoing, I have automatic flight life insurance through American Express in the amount of $1,000,000 each time my flight ticket is purchased by use of my American Express card. I am also covered in that amount while traveling to and from the airport, before and after the flight.

*I also have accidental death and dismemberment insurance through the Louisiana State Bar Associations group insurance with Gilsbar, Inc. The precise limits of those coverages are not now available.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   I have been on the bench approximately ten years during which I have been prohibited from practicing law therefore no pro bono work could be done. I cannot now recall specific pro bono cases in which I was involved (although there were many) and have no records available to which I can refer. I do recall providing pro bono legal services to St. Peter's Catholic Church, Board of Catholic High School and Sacred Heart Catholic Church. I also devoted much time to those organizations in a non-lawyer capacity and did the same for the Iberia Tuberculosis Association.

   In my twenty odd years of law practice with a small firm in a small town I was almost constantly providing pro bono legal services to at least one client of the firm in civil matters.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these polities?

   I do not, nor have I to my knowledge ever belonged to such an organization. While I am not a member of Iberia Golf and Country Club, I do own a share of its stock. I have investigated and am assured that it does not engage in any restrictive policies.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

No judicial selection commission in my jurisdiction played any part in my being considered for nomination to the Fifth Circuit Court of Appeals. I was contacted by a representative of the Department of Justice and asked if I had any interest in the position. Having expressed such interest, I was subsequently invited to Washington where I was interviewed by six or seven persons in the Department of Justice. Sometime later, I was informed by a representative of the Department that I was found to be acceptable and would be recommended by the Department to the President. I contacted the offices of Senators Johnston and Breaux and asked for their favorable consideration in the event of my nomination. Numerous friends and supporters of the Senators likewise contacted them in my behalf. I am told by friends and supporters of both Senators that they support my nomination. I am arranging for appointments to visit each Senator personally.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No. However in the Justice Department interviews my ideas of proper methods of interpreting the Constitution were explored.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals.

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The judicial function is to decide real disputes between parties who have a real and particular interest in the outcome, no more and no less. So says Article III of the Constitution. It clearly makes judges the settlers of real controversies between real parties at interest and not legislators or political scientists. It is unsuitable for a judge to tamper with the balance of rights struck by a proper legislative body under the cloak of constitutional review in order to make it fit his own idea of a better or more equitable policy.

However, judicial restraint does not equate with slavish adherence to the principle of stare decisis When the appropriate case presents itself, thoughtful reexamination of precedent is a valid and viable aid to orderly progress.

AMERICAN BAR ASSOCIATION
Standing Committee on
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Seattle, WA 98101

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355 South Grand Avenue
Los Angeles, CA 90071

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James A. Clark
Suite 1100
303 East 17th Avenue
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Post Office Box 78
2 Dexter Avenue
Montgomery, AL 36101

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John D. Lane
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1666 K Street, NW
Washington, DC 20006

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ABA/NET: ABA 461

July 11, 1988

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: JOHN M. DUHE, JR.
United States Court of Appeals
for the Fifth Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of John M. Duhe for appointment as Judge of the United States Court of Appeals for the Fifth Circuit.

Our committee is unanimously of the opinion that Judge Duhe is "Well Qualified" for this appointment.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

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LOUISIANA ASSOCIATION OF DEFENSE COUNSEL

August 5, 1988

The Honorable Joseph Biden
United States Senator
Chairman Judiciary Committee
Room 489
Russell Senate Office Building
Washington, D.C. 20510

RE: 5th Circuit
Nominations

Dear Senator Biden:

On behalf of the Louisiana Association of Defense Council we respectfully request that the nominations of Jacques Wiener, Jr. and Judge John Duhe to the United States Court of Appeal, 5th Circuit be confirmed.

Both Mr. Wiener and Judge Duhe have had outstanding legal careers and we feel they would make excellent additions to the 5th Circuit.

Sincerely,

Gordon Johnson Jr.

C. GORDON JOHNSON, JR.
PRESIDENT

/pll

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: (include any former names used.)

Norwood Carlton Tilley, Jr.
Nickname: Woody

2. Address: List current place of residence and office address(es).

OFFICE ADDRESS: Osteen, Adams & Tilley
Suite 305, Gate City Federal Savings and Loan Association Building
201 West Market Street
Post Office Box 2489
Greensboro, NC 27402
Telephone: (919) 274-2947

HOME ADDRESS: 1106 Montpelier Drive
Greensboro, NC 27410

3. Date and place of birth.

December 16, 1943; Rock Hill, South Carolina

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

I married Greta Ann Medlin (Tilley) on September 25, 1970. Greta is on a leave of absence from the Greensboro News & Record (Greensboro News Company, P.O. Box 20848, 200 East Market Street, Greensboro, North Carolina 27420), and is presently pursuing forms of writing other than newspaper feature writing.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Wake Forest College, Winston-Salem, North Carolina
Enrolled September, 1962
Graduated June, 1966 B. S. Degree

Wake Forest University School of Law,
Winston-Salem, North Carolina
Enrolled September, 1966
Graduated June, 1969 J. D. Degree

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations,

nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1987-1989: Director Guilford Wildlife Club, nonprofit affiliate of North Carolina Wildlife Federation.

February 16, 1977 to present: Partner in the law firm of Osteen, Adams & Tilley.

January, 1980 - May, 1980: Taught the course in Federal Courts at Wake Forest University School of Law while Professor Walker was on sabbatical.

January 2, 1974 - February 14, 1977: United States Attorney, Middle District of North Carolina.

September, 1971 - January, 1974: Assistant United States Attorney, Middle District of North Carolina.

September, 1969 - September, 1971: Law clerk to the Honorable Eugene A. Gordon, United States District Judge for the Middle District of North Carolina.

June, 1968 - August, 1968: Taught Business Law, Insurance and Advertising at York Technical College, Rock Hill, South Carolina, during summer between second and third years of law school.

August, 1967 - two weeks: Doorman and parking lot attendant at Siro's Restaurant, Saratoga Springs, New York.

August, 1966: Doorman and parking lot attendant at Siro's Restaurant, Saratoga Springs, New York.

Mid June - Mid July, 1966: Painted and helped to build docks for Mr. Dean Fonteneau, South Yarmouth, Massachusetts.

June, 1966: Graduated Wake Forest College.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

   "A" Rating, Martindale-Hubbell.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Permanent member of the Judicial Conference for the Fourth Circuit United States Court of Appeals.

American Bar Association

North Carolina State Bar

North Carolina Bar Association

American Trial Lawyers Association

North Carolina Academy of Trial Lawyers

Greensboro (N.C.) Bar Association

Federal Bar Association (past member)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

The only organizations to which I belong that are active in lobbying before public bodies would be the various bar associations listed in the response to question 9. Other organizations are as follows:

Guilford Wildlife Club

Wake Forest University Deacon Club

Hamilton Lakes Tennis & Swim Club

Hamilton Lakes and Parks Association

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

North Carolina Supreme Court .... September 18, 1969

United States District Court
for the Middle District of
North Carolina .... September, 1971

United States Court of Appeals
for the Fourth Circuit .... June 14, 1971

United States District Court
for the Eastern District of
North Carolina .... September 20, 1984

There have been no lapses.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. if there were press reports about the speech, and they are readily available to you, please supply them.

    A. "Defense Attorney I", Institute On Federal Criminal Practice, sponsored by the North Carolina Bar Association Foundation.

    B. "Closing Argument", How To Try A Federal Case, sponsered by the North Carolina Academy of Trial Lawyers.

    C. "Bid Rigging", Institute On Construction Law, sponsered by the North Carolina Bar Association Foundation.

    I have made no speeches concerning Constitutional Law or Legal Policy.

13. Health: What is the present state of your health? List the date of your last physical examination.

    Very Good. My last physical was March 8, 1988.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

    None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with signigicant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

    None.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

January 2, 1974 - February 14, 1977: Appointed United States Attorney for the Middle District of North Carolina. I was appointed first by Judicial appointment then nominated by the President and confirmed by the Senate.

September, 1971 - January 2, 1974: Assistant United States Attorney for the Middle District of North Carolina. Appointed by the Attorney General.

I have been a candidate for no other offices.

17. Legal Career:

a) Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Following graduation from law school, I clerked for two years with the Honorable Eugene A. Gordon, United States District Judge for the Middle District of North Carolina. The dates of my clerkship were September, 1969 until September, 1971.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

Following my clerkship with Judge Gordon, I became an Assistant United States Attorney in the Middle District of North Carolina, (September, 1971). I remained in that position until January 2, 1974, when I was judicially appointed United States Attorney. I was nominated and confirmed as United States Attorney and served until February 14, 1977, when I resigned to enter private practice with Osteen, Adams & Tilley the firm with which I have practiced since that time.

United States Attorney's Office
Post Office Box 1858
Greensboro, NC 27402
(919) 333-5351

Osteen, Adams & Tilley
Post Office Box 2489
Greensboro, NC 27402
(919) 274-2947

b) 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

The general character of my practice has been litigation, both criminal and civil. The primary emphasis has been federal white collar criminal cases, i.e. tax, anti-trust and fraud type cases. I have done very little state criminal work. My civil practice has been in both federal and state courts, and has been a general practice.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

In criminal cases my typical clients have been business people with no prior record who are charged federally with fraud related offenses.

In civil cases my clients have typically been persons involved in general commercial or personal injury litigation.

c) 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

During the eleven years of private practice I have appeared in court regularly. During my five and a half years in the United States Attorney's Office, I appeared with extreme frequency. I would estimate that during the latter period I averaged trying thirty-five cases per year, approximately 40% being jury trials, ninety-five percent being criminal.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

With regard to my eleven years of private practice, I would estimate that: (a) Seventy-five (75%) percent of my appearances were in federal courts; (b) Twenty (20%) percent of my appearances were in state courts; and (c) Five (5%) percent of my appearances in number, but less in time, were spent in courts such as appearances before the U. S. Magistrate, Bankruptcy and State Traffic courts.

3. What percentage of your litigation was:
   (a) Civil;
   (b) Criminal.

Of those appearances in the past eleven years I would estimate that approximately (a) Thirty (30%) percent was civil; and (b) Seventy (70%) percent was criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

In the past eleven years I have tried twenty (20) cases to verdict. I was sole counsel in eight, chief counsel in four, associate counsel in one, and co-counsel in seven. I distinguish "co-counsel" from either "chief" or "associate" because my law partner William Osteen and I divide trial work evenly - both in witness examinations and arguments - when we try cases together.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

Thirty-six (36.8%) percent were non-jury and Sixty-three (63.2%) percent were jury trials.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
    (a) the date of representation;
    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
    (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

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UNITED STATES
v.
ARTHUR TILMER MANKINS
CR-182-WS-73

The Honorable Hiram H. Ward
Chief Judge
United State District Court
246 Federal Building
Winston-Salem, NC 27101
(919) 761-3114

APPEARANCES:

FOR MANKINS	R. Bradford Leggett, Jr. Allman, Spry, Humphreys, Leggett & Howington Suite 500, 2000 W. 1st Street Post Office Drawer 5129 (919) 722-2300
FOR JERRY THOMAS DISCHER	Eddie C. Mitchell Cofer, Mitchell & Tisdale, P.A. 12 - 1st Home Federal Building Winston-Salem, NC 27101 (919) 725-9597
FOR RICHARD NEWSOME	Harrell Powell, Jr. Suite G-11 120 West 3rd Street Winston-Salem, NC 27101 (919) 725-5300
TRIAL BEGAN	July 31, 1973
VERDICT RETURNED	August 2, 1973
APPELLATE CITE	479 F.2d 1265 (4 Cir. 1974) - cert. den. 419 US 899, 95 S.Ct. 182, 42 L. Ed 2d 145

This case, like most of those in which I have been involved, had little jurisprudential significance. There are several reasons why it is one of my most memorable, and personally significant cases. In 1973, Arthur Tilmer Mankins, a man who once had shot his way out of the Forsyth (N.C.) County Jail, had been transferred to a minimum security, youth correctional facility in Lillington, North Carolina. His girlfriend, Bonnie Logan, and her two roommates, Richard Newsome and Jerry Thomas Discher, helped Mankins and another inmate, Willie Cole, escape. The group drove to Greensboro and comandeered an apartment occupied by a man who sold drugs for Newsome. There, Mankins, Newsome, Discher and Logan formulated plans for a bank robbery. Growing distrustful of Willie Cole, Mankins confided that he was going to dispose of Cole by injecting battery acid into Cole's veins. Unable to keep the secret, the apartment's regular occupant warned Cole and helped him slip away.

With Logan, Newsome and Discher providing support, Mankins robbed a branch bank near Winston-Salem, then headed to Charlotte with Logan. Within hours the FBI received a tip placing Mankins and Logan at a motel near Interstate 85. Mankins and Logan, in turn, received a warning telephone call from a taxi driver whom Logan had tipped generously and whom the FBI had interviewed shortly after he had dropped Logan off at the motel following a shopping spree. Mankins ran from the motel room, shot a dog in a neighboring yard and hid among some buildings under construction. As twenty-seven year old FBI agent, Gregory Spinelli, rounded the corner of a building, Mankins shot and killed him.

Mankins, Newsome and Discher all pled not guilty to the bank robbery charges. The case against Mankins was simple; he had entered the bank alone, undisguised. The case against Newsome and Discher was more complex, circumstantial and was complicated by several of the witnesses, including Willie Cole, becoming unresponsive on the stand.

The case was tried in July 1973, lasted three days and all three were convicted. I was assisted in neither trial nor appeal.

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UNITED STATES v. TROY WILLIAM SANDERS CR-75-66-G	Honorable Hiram H. Ward United Sates District Court 246 Federal Building Winston-Salem, NC 27101 (919) 761-3114

APPEARANCES:

FOR TROY SANDERS	William L. Osteen Osteen, Adams & Tilley 201 West Market Street Post Office Box 2489 Greensboro, NC 27402 (919) 274-2947
TRIAL BEGAN	June 9, 1975
VERDICT RETURNED	June 12, 1975

This case was the most difficult I have ever tried.

On October 15, 1974, two robbers covered from ski masks to loosely fitting coveralls and armed with a sawed off shotgun and automatic pistol dragged a female teller from a Northwestern Bank branch in Greensboro to the car they had stolen for a getaway vehicle. Just as they started the car and pushed the hostage away, a Greensboro police car happened by and began chase. Down a street and through a parking lot, the robbers outmaneuvered the officer, pulled up behind him and blew the back window out of his car with the shotgun. Pulling around front, they used a high powered rifle to immobilize the police car by puncturing the radiator.

A car found abandoned in Greensboro belonged to a Charlotte fireman, Jerry Rogers. Rogers' half brother, Troy Sanders, rented a farm near Concord, N.C. on which were found shotgun shells and rifle casings matching those found in the abandoned getaway car. Several items were found in still another stolen vehicle abandoned near Greensboro. The most telling was a newspaper with fingerprints of Buddy Rogers, Jerry Rogers' brother and Troy Sanders' half brother. Troy Sanders had served a previous prison sentence for safe cracking and Buddy Rogers was a suspect in another bank robbery.

After being interviewed by the FBI and denying any knowledge of or participation in the robbery, Troy Sanders, his wife and child disappeared from the farm. The FBI developed information that Sanders had headed to his home state of Texas, perhaps to meet with Buddy Rogers and three of their cousins who were wanted in various districts for bank robbery. The information proved correct and Sanders was arrested. He was armed with an automatic pistol identified by bank witnesses as similar to one used by the shorter of the two robbers. Subsequent investigation showed that Sanders' mother had purchased several firearms in the months prior to the robbery.

The evidence was almost totally circumstantial and Troy Sanders was represented by former U. S. Attorney, William L. Osteen, my predecessor, my present law partner, and the best trial lawyer I know.

The case was tried in the summer of 1975, and lasted about three days. The jury found Sanders guilty of committing bank robbery by taking a hostage, a violation carrying a maximum of life imprisonment.

The morning after the jury returned its verdict, an acetylene torch was found hanging just outside a window near the basement cell where Troy Sanders was housed. A jail trusty admitted that he was supposed to pass the torch through the window bars to Sanders inside his cell. As he reached for the torch, the trusty became frightened and told Sanders the hose would not stretch far enough to reach his cell.

Outside the jail, three cars stolen just that night, had been positioned in strategic places so that a getaway similar to that used after the bank robbery could be accomplished by switching vehicles.

Prior to sentencing, Sanders was offered and accepted an unusual arrangement: If he could persuade Buddy Rogers to surrender, the government would recommend that Sanders receive a twenty-four year term instead of life. Rogers, who was hiding in Arizona, surrendered to help his brother and eventually pled guilty.

I was not assisted at trial.

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UNITED STATES v. HAROLD WILLIAM STANFIELD (aka "Cookie")	Honorable Eugene A. Gordon United States District Court U.S. Post Office & Courthouse P.O. Box 3285 Greensboro, NC 27402 (919) 333-5356
CR-75-411-G	
21 USC § 841(a)(1) & 846	
APPEARANCES:	
FOR STANFIELD	Locke T. Clifford McNairy, Clifford, Clendenin & Parks 300 Southern National Bank Building 127 North Greene Street Greensboro, NC 27401 (919) 378-1212
FOR THE GOVERNMENT	N. Carlton Tilley, Jr. Benjamin H. White, Jr. P.O. Box 1858 Greensboro, NC 27402 (919) 333-5351
TRIAL	Tuesday, January 17, 1976 - January 19, 1976.
FOURTH CIRCUIT NO.	76-1483

Again, the prime significance of this case lay not in setting new precedent or altering the course of legal history but in simply convicting a fairly large scale heroin dealer who was one of the two meanest and most dangerous people I prosecuted. Cookie had been acquitted of several previous charges because witnesses were intimidated and refused to testify against him.

Several of Stanfield's associates had died under questionable circumstances. Cookie, who as an amateur boxer had fought Ken Norton to a draw, enjoyed inflicting pain and watching others suffer.

North Carolina State Bureau of Investigation undercover agents had made contact with a dealer supplied by Stanfield. The dealer, Danny Holland, had described "his man" as "an ex-boxer and crazy as hell."

On October 28 and November 3, 1975, the agents placed orders with Holland. Surveillance agents followed Holland to Stanfield's apartment. On one of the occasions Stanfield was observed going into the woods behind his apartment and returning to the apartment before Holland left. When he was arrested several days later, Cookie had $200 in bills marked by the agents.

Following Stanfield's conviction and 16-year sentence he was assigned to the federal penitentiary in Atlanta where he embarked on another campaign of terror. He sent a black carnation to the U. S. Probation Officer who made the pre-sentence report and once wrote Judge Gordon that he was "knitting a shawl for Mrs. Gordon." Judge Gordon wrote back thanking Cookie but explaining that federal judges were not allowed to accept gifts.

Cookie finally made one too many threats, according to an inmate who served time in Atlanta. Cookie was in isolation for beating a guard when someone stole his cache of drugs. Upon getting out of isolation and finding the drugs gone, Cookie put out the word that he would kill the person who stole them. Not long afterwards Cookie was knifed in the back coming out of a shower.

I was assisted at trial by Benjamin White, Chief Assistant U. S. Attorney.

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UNITED STATES
v.
ROBERT D. HOLLEMAN, et al

CR-76-238-D

Honorable Robert E. Maxwell
Chief Judge
U.S. District Court
Post Office Box 1275
Elkins, W. VA. 26241
(304) 636-5198

APPEARANCES:

FOR BOBBY R. ROBERTS	William Murdock - deceased Jerry L. Jarvis Suite 402, Croasdale Drive Durham, NC 27705 (919) 383-0455
FOR J. B. HARRIS	William D. Caffrey Eugene W. Purdom Nichols, Caffrey, Hill, Evans & Murrelle 500 W. Friendly Avenue Post Office Box 989 Greensboro, NC 27402 (919) 379-1390

FOR WILLIAM W. EDWARDS	James T. Williams, Jr. L. P. McLendon, Jr. George W. House Brooks, Pierce, McLendon, Humphrey & Leonard Post Office Drawer LL Greensboro, NC 27402 (919) 373-8850
FOR ROBERT D. HOLLEMAN	Robinson O. Everett Everett & Hancock 300 First Union Bank Building Post Office Box 586 Durham, NC 27702 (919) 682-5691
	Norman E. Williams 205 North Church Street Durham, NC 27701 (919) 682-2126
FOR WILLIAM R. WINDERS	James B. Maxwell Maxwell, Freeman & Beason Post Office Drawer 51247 Durham, NC 27717 (919) 493-6464
	Richard M. Hutson, II Mount, White, Hutson & Carden, P.A. 201 N. Roxboro Street Post Office Box 1371 Durham, NC 27702 (919) 683-1565

This case, several months in both investigation and trial preparation, involved charges of misapplication and the aiding and abetting of misapplication of more than 4 million dollars from a federally chartered and insured savings and loan association through the making of sham loans, loans to financially incapable borrowers and loans made in the names of straw borrowers who were not held accountable for repayment. Charged were the former President and the former Treasurer of the Association, a building contractor and developer who received the proceeds of the loans and two attorneys who participated in the disbursement of the loans and concealment of the true identities of the recipients. Presiding at the trial was visiting Judge Robert Maxwell from the Northern District of West Virginia. Trial began on January 19, 1977 and ended February 6, 1977, with a jury verdict of guilty on 57 of 59 cumulative counts. The convictions were upheld on appeal.

The personal significance of the case was that it was the last case I prosecuted as United States Attorney for the

Middle District. It was the culmination of the most extensive white collar criminal investigation undertaken to that point in the Middle District and had been one of the most publicized.

The further significance and one of considerable personal distaste was prosecuting the father-in-law of a person who several years earlier had supported my nomination as U. S. Attorney and prosecuting two attorneys, neither of whom I knew intimately but both of whom I liked.

My role was that of chief counsel; the Assistant U. S. Attorney who assisted me had just graduated from law school and had never argued before a jury.

By the time appellate briefs were scheduled, I had entered private practice and did not participate by name on the brief or in arguing the case on appeal. All convictions were affirmed in an unpublished opinion, 77-1618.

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UNITED STATES v. HALTON Q. BITTICK	United States District Court for the Middle District of North Carolina
CR-80-17-G	Honorable Eugene A. Gordon United States District Judge U.S. Post Office & Courthouse Post Office Box 3285 Greensboro, N.C. 27402 (919) 333-5356

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TRIAL BEGAN March 31, 1980
VERDICT RETURNED April 23, 1980

APPELLITE CITE *U.S. v. Brainard* 690 F2d 1117 *(4 Cir., 1982)*

Defendants Bittick and Brainard had been the principals in National Executive Planners, Inc. (NEP), a Greensboro, North Carolina financial consulting firm. NEP offered and subsequently sold to more than one thousand customers a "product" known as Television Marketing (TVM). The concept, as explained to potential customers, was that TVM was a Chicago, Illinois company that purchased manufacturing rights to small convenience and kitchen items such as veg-o-matics, promoted them through television advertising and then sold them to large retailers including Sears. Because of an approximate six month lag time between shipping and receipt of payment, TVM was willing to pay high interest rates to investor-lenders for loaning it money during the interim. Loans would be secured by the assignment of accounts receivable, interest would be paid monthly and investors could get their money out at any time. Over a period of several years more than 4 million dollars was invested in or loaned to TVM.

In reality, TVM had not been an active corporation for several years, and while it once had engaged in a business similar to the one described to potential investors, it had no contracts at all with Sears or other retail establishments. TVM was a Ponzi or Pyramid scheme masterminded by Shelden Moss in Chicago, Illinois. Moss kept the scheme alive by making monthly interest payments from current receipts.

Bittick and Brainard were indicted along with Moss and one of Moss's Chicago associates, Sheldon Rothman. Moss pled guilty and the charges against Rothman were dismissed. Bittick and Brainard were each charged in eighteen (18) counts of mail fraud, 18 USC 1341, and Bittick was further charged with making false or misleading statements to the SEC, in violation of 15 USC 78ff.

Trial began on March 31, 1980, and lasted almost four weeks. At issue was whether Bittick and/or Brainard had knowledge that TVM was not a legitimate investment. Each defendant denied that knowledge. Moss had made statements to third persons that neither Bittick nor Brainard had knowledge, but Moss was not called to the stand. His attorney appeared before the Court and stated that if called, Moss would invoke the Fifth Amendment and refuse to testify. The Court found that Moss was not "unavailable" according to the Federal Rules of Evidence and did not permit hearsay testimony by third parties regarding Moss's statements about the Defendants lack of knowledge.

The remaining evidence presented a close question. Bittick himself had not invested in TVM; but, on the other hand, had recommended it to only one or two customers. Bittick did own a number of rental units in Greensboro in partnership with Moss. Moss came to Greensboro on a monthly basis and normally stayed in the Bitticks' home. Bittick and Brainard both vehemently denied knowledge of the scheme.

The jury found Bittick guilty on 14 counts and not guilty on four.

Bill Osteen and I divided both examination of witnesses and arguments.

Although we did not participate in the appeal other than in an advisory capacity, the Fourth Circuit reversed both defendants' convictions because the trial judge had not admitted Moss's statements that neither Bittick nor Brainard knew what he was doing.

On remand, Bittick negotiated a plea and Brainard was convicted following a second jury trial.

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UNITED STATES
v.
JAMES MILBURN HOOTS

CR-82-30-01-G

Honorable Hiram H. Ward
Chief Judge
United State District Court
246 Federal Building
Winston-Salem, NC 27101
(919) 761-3114

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James Milburn Hoots was the owner of Hunter Haven, a gun and hunting supply store. Hoots had returned to Hunter Haven one night to work on an inventory of items he was returning to suppliers. Finishing that, he went into the back area of the store and began to work with a chainsaw he planned to use the following weekend. As he started to pour gas from a large metal can into a metal funnel, a flash occured. Hoots dropped the gasoline can and fell to the floor seconds before an explosion and fire demolished a large portion of the back store area. He was charged, federally, with using an incendiary device to damage a business engaged in interstate commerce. Trial began the week of May 10, 1982 and ended with an acquittal on May 19, 1982.

The trial was significant to me for two reasons. First, Hoots was the most difficult client to get along with I ever had; but, a client I am convinced was innocent. Secondly, information was developed in cross examination of the government's technical and expert witnesses that was previously unknown, contained in no reports, and which may have been crucial to the outcome.

The ATF arson team which arrived at Hunter Haven within hours following the fire removed floor tiles containing gasoline in the area where Hoots was working with the chain saw. Near the back doors where the fire was hottest, some 30 feet to 35 feet away, a petroleum distillate similar to that used in WD-40 was found on the floor tiles, but no gasoline. Next to the back door was a gun rack where repaired guns were placed and sprayed with WD-40.

The arson investigator employed by the insurance companies did not visit the scene until five days after the fire. The tile samples he took from the back door area tested positive for the presence of gasoline indicating the fire could not have had an accidental origin. On voir dire it was learned that the investigator had taken tile samples from the chain saw area and the back door area and enclosed both together in a plastic container where they stayed for over a week until opened by the chemist. It was established by other evidence that during cleanup after the fire, but before the investigator's visit five days later, a gasoline powered generator had been located in the vicinity of the back door.

ATF Agent, Gus Gary, testified on direct that he had conducted a "pour test" and determined that liquids spilled where Hoots had testified the gasoline can was dropped did not follow the same path as did the gasoline on the night of the fire. On cross, it was learned for the first time that Gary poured the test liquid about seven feet away from where Hoots dropped the can. He was not sure why.

Bill Osteen and I tried the case together, dividing both examination of witnesses and argument.

The case was close and one that classically fell within the disparity of burdens of proof. A civil jury later found for the defense in Hoots' action to recover fire insurance.

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UNITED STATES
v.
SMITH W. BAGLEY, et al
CR-79-52-01-WS

United States District Court
for the Middle District of
North Carolina
Honorable Robert R. Merhige, Jr.
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TRIAL BEGAN July 16, 1979
VERDICT RETURNED August 1, 1979

Smith W. Bagley and James R. Gilley respectively, had been Chief Executive Officer and Chief Financial Officer of The Washington Group, a Winston-Salem, North Carolina, based conglomerate. Bagley, a grandson of R. J. Reynolds, had twice run for Congress in North Carolina's fifth district and at the time the investigation began was reputed in the press to be a close friend of President Carter. President-elect Carter had vacationed at Bagley's Sea Island, Georgia, Plantation following the 1976 election.

Gilley had been center for the 1957 Wake Forest basketball team which lost four games to UNC's undefeated national champions by a total of about nine points.

Following the filing of a Chapter 10 Reorganization, the FBI began investigating the financial affairs of The Washington Group during the Bagley and Gilley era. (At the time of the Reorganization, Bagley had sold his stock to Gilley and had moved to Washington, D.C.)

During a fairly short period, Bagley and Gilley had merged Bagley's ice cream shops and Gilley's convenience stores into a company that acquired controlling interest in Washington Mills, a textile operation headquartered in Winston-Salem. The new organization became The Washington Group, Inc. and acquired other companies both within and without North Carolina. During this expansion, over the counter stock in The Washington Group continued to rise while the Dow Jones was sliding. Bullish on their company, Bagley and Gilley approached the Trustees of The Washington Group's pension and profit sharing plans about increasing their holdings of company stock. Bagley and Gilley encouraged officers of the company to invest and each guaranteed personal loans at Northwestern Bank for key employees who wanted to do so.

When the 1973-1974 recession wholloped the textile industry, Bagley resisted layoffs and inventories became stockpiled. The price of the stock soon fell precipitously.

After an investigation that lasted about a year, Bagley, Gilley, Shirley Grubb (Bagley's secretary), William Thomas (an Interstate Securities stock broker who made a market in The Washington Group stock) and Dewey Chappell (Northwestern Bank's, City Executive in Winston-Salem) were indicted on charges of conspiracy, stock manipulation, bank misapplication and mail fraud.

In representing Bagley, Bill Osteen (my law partner), Daniel Reznick, Paul Ryerson (Arnold & Porter) and I spent months digesting thousands of pages of documents.

Because of Bagley's and Gilley's high community profile, publicity during the investigation and especially after indictment was tremendous. Upon agreement between the Defendants and the Government, trial was moved to Richmond where Judge Merhige, who had been assigned the case, normally sat.

Bill Osteen had become, informally, chief spokesman for the nine defense lawyers who actually participated in trial.

We rented a U-Haul truck to transport what we estimated to be over a ton of paper from Greensboro to Richmond.

The government had listed over 80 witnesses and 1800 pages of exhibits.

Responsibility for primary cross-examination was assigned to counsel for the defendant we perceived would be most affected by a particular witness's testimony. Secondary cross was assigned to counsel for the defendant apparently next most affected.

Dan Reznick was responsible for the cross of three highly technical witnesses including those who expressed an opinion regarding the manipulation of stock sales.

As we normally do in trials when both are involved, Bill and I divided cross of the remaining witnesses and split the argument.

Trial began on July 16, 1979 and ended on August 1, 1977, when the jury returned verdicts of not guilty as to all defendants.

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BRANT J. SPICER
v.
CHARLES BULLA

C-83-943-G

U. S. DISTRICT COURT, M.D.N.C.
Honorable Frank W. Bullock, Jr.
United States District Judge
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Brant Spicer, returning home from an evening horse auction with his son, his friend, and friend's son, stopped to buy a pack of cigarettes at a convenience store near Asheboro, N. C. A man behind the counter produced a shotgun and announced to Spicer that he was robbing the store. Several minutes after releasing one of the customer-hostages, two plainclothes Asheboro detectives walked into the store and asked, "Is this the place where a robbery was reported?" "You're damn right," replied the robber, raising his shotgun and grabbing a hostage as a shield.

One officer, Sergeant Charles Bulla, dove behind the checkout counter. The other, Detective Lannie McIver, sought cover behind one of the standing shelves. When the robber, still holding a bystander as a shield, pointed the shotgun toward McIver, Bulla jumped up and fired his .357 magnum toward the robber. The bullet went through the cash register, through the hostage and into the robber, who dropped his weapon and stumbled toward a door on the opposite side of the store. As Bulla shot, Brant Spicer ducked out the near door and dropped down on the pavement. When McIver followed the robber out the opposite door, Bulla came out the door Spicer had used, saw Spicer, raised his gun and fired. The bullet shattered the ulnar nerve in Spicer's left arm.

The action was brought under 42 USC § 1983. Trial began on December 16, 1985. The case was settled several days later just before it was to be argued before the jury.

The case was significant to me because of the unique factual situation and because of the courts' inconsistent interpretations of § 1983 during the time immediately prior to our case coming on for trial.

Richard Towers from High Point, N.C., assisted me in representing Spicer at trial. Randall May, formerly Towers' law partner, had worked on the case before becoming a state prosecutor, but was unable to participate in the trial.

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UNITED STATES
v.
W. F. BRINKLEY & SON
CONSTRUCTION CO., INC.
and
WILLIAM F. BRINKLEY, JR.

84-7-CR-2

United States District Court
Eastern District of North
Carolina
Honorable Terrence W. Boyle
U. S. District Judge
Federal Building
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William F. Brinkley, Jr., President of W. F. Brinkley and Son Construction Company, was indicted for conspiring to violate Section One of the Sherman Anti-trust Act, 15 USC §1. Part of the conspiracy was alleged to have been an agreement to rig bids between Brinkley and a competitor, Crain and Denbow, Inc.

Neither Harold Crain nor Ed Denbow, the individual principals of Crain and Denbow, were indicted. Given immunity and called as government witnesses, they testified that they had placed a money deposit to obtain a set of plan specifications from the project engineer and fully intended to place a competitive bid. On the morning of the day when the bids were to be submitted, they dispatched an employee with a signed but incomplete proposal from their Durham (N.C.) home office to Elizabeth City, N.C. where the project was to be let. As was their custom, Crain and Denbow would continue to take late quotes from material suppliers and subcontractors until the last minute. Their employee was instructed to call the home office for those figures when he arrived in Elizabeth City.

Before their runner reached Elizabeth City, Crain and Denbow was informed by its main subcontractor that he was unable to complete his bid. The work the subcontractor was to perform constituted about half of the project so Harold Crain and Ed Denbow decided they could not compete for the job. They could not guess at a bid because they might be low and might be awarded a job they could not perform profitably. For two reasons they wanted to submit a bid: first, a late refusal to bid would endanger the relationship with the project engineering firm, a firm with whom they worked on other projects; and second, by placing a bid they would have the plan deposit refunded.

Either Crain or Denbow called Brinkley and told him their pipeline subcontractor had refused to quote the job and that they could not bid it. They asked him to give them a "safe" number to bid. A "safe number" meant one that was above what Brinkley was bidding. Brinkley's agreement to do so constituted the basis for the conspiracy charge.

Bill Osteen and I tried the case together. Brinkley was convicted and we appealed. The primary ground raised was the jury instruction that if Brinkley had agreed that his bid would be either higher or lower than another's, the agreement would be a bid rigging agreement, per se unlawful, and that the necessary criminal intent would be presumed.

Feeling strongly that the instruction was error and that the various Courts of Appeal had improperly eviscerated the holding of U.S. v Gypsum that intent was an element to be proved and not presumed in a criminal anti-trust case, i.e. that a defendant must be shown to have had knowledge that his action might produce anti-competitive results, we agreed to pursue this appeal to the Fourth Circuit for no fee.

Cases from several circuits had held that the proof of intent required by Gypsum was satisfied by showing a defendant entered into an agreement the effect of which was to rig bids. Such a standard, however, compels conviction of a person who in good faith, with no idea that trade might be restrained or competition dampened, agrees to perform an act which is later determined to be "bid rigging" and therefore "per se illegal". Said another way, the only intent required by that standard is the intent to agree; whether a defendant understands to what he has agreed is irrelevant.

A panel of The Fourth Circuit, albeit in dicta, had indicated in U.S. v Foley a reading of Gypsum similar to ours. Another panel's opinion authored about the same time had indicated to the contrary.

I wrote the appellant's brief, reply brief, and argued the case. The Court affirmed the conviction in an opinion reported in 783 F.2d 1157 (4 Cir., 1986).

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UNITED STATES v. WILLIAM C. RAY	Honorable Frank W. Bullock,Jr. U. S. District Judge Post Office Box 3807 Durham, NC 27702 (919) 541-5275
CR-86-199-02-G	

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Bill Ray, a Greensboro attorney, was indicted in the Middle District of North Carolina along with Miami, Florida, lawyer Burton Levy and former U. S. Customs Special Agent David Vogt on charges of conspiracy to obstruct IRS agents and for alleged violations of the Racketeering Influenced and Corrupt Organizations (RICO) statutes.

In the 1970's, Vogt had been a Special Agent, then an Air Officer with Customs near Miami. It was alleged that Vogt had been paid between $300,000 to $700,000 by Phillip Keidaish, a marijuana smuggler, for informing Keidaish about Customs' air interdiction activities.

It was charged that Levy and Ray assisted Vogt in setting up various corporations through which Vogt repatriated his money from off shore accounts and through which Vogt purchased a boat, an airplane, automobiles and a luxury motor home.

Evidence showed that when Ray first met Vogt, Vogt had resigned from Customs and was the owner of the Colonial Manor Apartments in Greensboro. Ray began representing Vogt in connection with the apartments and then, with respect to other matters after Vogt sold his apartments for a profit of $600,000.

In 1983, Vogt was tried in Florida on state charges based upon allegations that he had received money from Keidaish. Bill Ray was associate counsel for Vogt in that trial, and Vogt was aquitted.

Trial began in Greensboro on April 6, 1987 and was heavily spiced with testimony by Keidaish about the logistics of flying planes to Columbia, South America, to pick up marijuana and return undetected to the United States; with testimony about the Keidaish partnership with the Di Lisi family; and with testimony by ex-CIA operative James Wilson, pilot on a number of the smuggles.

The defense of Ray was complicated by a count charging him with perjury before the Grand Jury. After several weeks of trial, when the government sought to introduce the transcript of Ray's testimony, attorneys for Levy and Vogt objected because their clients were named. The government sought to redact the names and we objected because the allegedly false statements could not be viewed in their proper context with statements relating to

Vogt and Levy erased. Judge Bullock, on his own motion, severed the perjury count and announced that it would be tried before the same jury following return of the principal verdict.

After retiring to deliberate on Monday, June 15, 1987, the jury returned a verdict on Thursday, June 18, 1987, convicting Vogt on two charges and acquitting Ray and Levy.

The perjury trial began on the following Monday, June 22, and ended on Tuesday, June 23, with a verdict of not guilty.

Bill Osteen and I, as counsel for Ray, divided examinations of witnesses both on cross and direct and also each of us argued to the jury.

The case was significant because of its length - we had set a fee based on three weeks. Also, because of the heavy, daily publicity and the emotional overtones. A few days before the end of trial our client had what appeared to be a heart attack and was removed from the courthouse by ambulance. The difficulty turned out to have been an anxiety attack.

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19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

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KENNETH RANDALL BERGMAN, JR. v. SAFETY DEVICES, INC., et al	NORTH CAROLINA GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION GUILFORD COUNTY, N.C. 79-CvS-3894

SETTLED BEFORE TRIAL

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While this case was settled prior to trial, it was one of the five most significant matters pertaining to litigation in which I have been involved.

In October, 1978, a twenty-one year old fireman was demonstrating a "Quick Descent Lifeline Device" for a group of elementary school students visiting his fire department. He climbed up the boom truck ladder about 40 feet above the parking lot, strapped on the velcroed wristlets and stepped off the ladder. Instead of the controlled descent he had made on previous occasions, Randy Bergman plummeted feet first onto the concrete pavement and suffered a vertebral compression fracture at the T12 level. As a result, he became a semi-paraplegic and lost bowel, bladder and sex functions.

Examination of the device by an engineering firm revealed failure of an improperly closed figure eight airplane clamp by which the wristlets were attached to an "O" ring and thus to the cable of the lifeline device. In fact, a microscopic analysis indicated that a hammer and chisel had been used instead of the proper crimping device.

Only extensive discovery and depositions revealed who was responsible for manufacturing the device and whether a financially capable party was in fact liable.

The device had originally been patented by Clarence Byrd, the inventor; but soon thereafter Byrd assigned the patent to Safety Devices, Inc., a corporation in which Lacy J. Miller was the majority shareholder. Miller was also the majority shareholder of Lacy J. Miller Machine Company, Inc. Miller Machine Co. was a successful, money-making concern with assets. Safety Devices was not.

The failed Quick Descent Device itself had not been purchased by the Fire Department but had actually been loaned to the Fire Department as a test unit by Clarence Byrd. Discovery revealed that at the time of making the loan, Byrd was working as General Manager of Miller Machine Company. The device had been partially assembled by Byrd's own company but Byrd Machine Company, Inc. had delivered the unit to Safety Devices without the cable having been installed or the wristlets attached.

It developed through deposition that a few weeks prior to the Bergman accident, a Winston-Salem fireman demonstrating an identical device at a shopping mall had fallen a short distance when the airplane clamp on his wristlets failed. The fireman had returned the device and the failed clamp to the office of Miller Machine Company where he had obtained it.

Further discovery disclosed that Safety Devices, which was located on the Miller Machine Company premises, obtained many of the component parts it assembled from Miller Machine Company, had not paid for those parts for a long time, and had not been asked to pay for them. The employee who most probably had affixed the clamp in Bergman's case was a younger brother of Lacy Miller and, while he worked daily for Safety Devices, was on the Miller Machine Company payroll.

The case was both delayed and complicated by Lacy Miller's personal problems. Miller, a manic depressive, also suffered from congestive heart failure. During this time frame, he had been ordered by a State judge to stay off the Miller Machine premises after going there with a loaded firearm. A court ordered deposition of Miller in our case was attempted at Baptist Hospital in Winston-Salem with his cardiologist present. During the questioning, the cardiologist called for an adjournment. Miller died before examination could be resumed.

After the Administrative Office of the Court finally granted the parties' request for a special term, the case was settled in the Spring of 1983.

The original complaint named Miller Machine Company and Safety Devices as Defendants. The defendants filed third party actions against Byrd, Byrd Machine Company, Latrobe Die Casting Company (manufacturer of the metal castings from which the hub of the device was fabricated) and National Telephone and Supply Company (seller of the wire rope and airplane clamps). During the course of discovery the complaint was amended to name Byrd and Byrd Machine Company as Defendants.

-0-

FIRST UNION NATIONAL BANK v. HELEN C. STANLEY, Trustee, et al. C-83-256-M C-83-865-M	Western District of North Carolina Honorable James B. McMillan United States District Judge Room 254, Charles R. Jonas Bldg. Charlotte, N.C. 28202 (704) 371-6106

APPEARANCES:

FOR FIRST UNION NATIONAL BANK	Edward T. Hinson, Jr. William K. Diehl, Jr. 700 Home Federal Building 139 South Tryon Street Charlotte, NC 28202 (704) 372-9870
FOR HELEN STANLEY, Trustee	N. Carlton Tilley, Jr. John T. Weigel, Jr. Gate City Federal Savings & Loan Building Post Office Box 2993 Greensboro, N.C. 27402 (919) 379-9808

John David Stanley's parents, former Virginia Governor Thomas Stanley and Mrs. Stanley, created a trust for the benefit of John David's three minor children. During the period in question, John David Stanley's wife, Helen Stanley, was the substitute Trustee of the "Children's Trust".

In 1975, several John David Stanley controlled corporations were in a Chapter 11 arrangement proceeding in the Bankruptcy Court for the Western District of Virginia. First Union National Bank (FUNB), a North Carolina bank, was the second largest creditor and was totally unsecured. Stanley and FUNB agreed upon a "workout" arrangement whereby FUNB would loan Stanley additional money to pay off other creditors in return for a collateralized position. Stanley and FUNB officials obtained Helen Stanley's agreement for the Children's Trust to loan money for the workout by the Children's Trust borrowing $326,000.00 from Piedmont Trust Bank in Martinsville, Virginia and loaning it to Stanley.

FUNB continued to loan large sums of money to Stanley businesses including Sitting Rock Farms in North Carolina, a modern Arabian Horse Breeding farm. Evidence developed through discovery tended to show that FUNB employees, hoping to convert the farm into a financially productive business that could begin servicing the debt to the bank, loaned money to construct breeding barns, show and sales facilities, install fencing, and purchase additional land.

When the outstanding Stanley indebtedness to FUNB reached approximately Five (5) million dollars, Stanley, an FUNB officer, and a former FUNB lawyer who had gone to work for Stanley, approached Helen Stanley as Trustee and recommended that she purchase Sitting Rock Farms as an investment for the Children's Trust. FUNB financed approximately 1.4 of the 1.7 million purchase price. Deducting the attorneys' fees, the entire puchase price went back to the bank to be applied toward Stanley's debts and businesses. FUNB obtained a better collateralized position and substituted a capable borrower for one who had proven quite incapable. This at a time when an internal bank memorandum authored by the same employee who recommended to Helen Stanley that the Farm was a good investment, indicated that the market value of the farm was actually $900,000.00.

Several months after the Farm Sale, Helen Stanley was approached by the same three individuals who this time recommended that she purchase three Arabian Horse Breeding Trusts for approximately $600,000 each. Again, the Bank financed the purchase, received most of the money back as payment of Stanley debt, and obtained a capable borrower.

The concept of the Breeding Trust was that each would include one stallion and seven foal-capable mares. Of the twenty-four horses purchased by the Children's Trust, several of the mares were barren and several others were subject to undisclosed purchase money liens. The effort to sell horses by marketing them in Breeding Trusts (a concept suggested by Stanley, encouraged by FUNB, and undertaken on a nationwide basis for months) had not resulted in the sale of a single breeding trust until the sale to the Children's Trust.

The Trustee made payments to the bank on the various notes until advised by counsel to cease payment. The bank brought suit in the Western District of North Carolina and I was associated as co-counsel for the Children's Trust which raised the affirmative defenses of fraud - both actual and constructive.

Discovery was extensive. There were numerous depositions and thousands of documents.

The Court granted summary judgment for the Bank and the Trustee appealed. On the night before oral arguments were to be heard before the Fourth Circuit in Richmond, the case was settled.

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II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

There are no anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts or other future benefits that I expect to derive from previous business relationships, clients, former employers, or customers. I anticipate that when I leave my law firm, it will be with the understanding that I will receive no further share of partnership income, even that resulting from services I have performed.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I know of no categories of litigation that would present a potential conflict. Obviously, I could not hear any matters concerning clients of my present law firm.

Greta has been employed by the Greensboro News and Record for a number of years and has been a participant in a 401 K Savings Plan and a non-contributory pension plan. Since the end of May, 1987, she has been on an unpaid leave of absence to write and teach at various journalism seminars. She has until the end of May, 1988, to elect whether or not to return to the newspaper. If she does not return, she will have to withdraw from the savings plan.

I intend to resolve any potential conflict by a two step process. First, I would decide myself whether I could hear a matter without being influenced by the existence of a present or past relationship. If not, I would recuse myself. If so, I would inform the litigants of the existence of the relationship and give them an opportunity to object.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See Financial Disclosure Report, AO-10, attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See Financial Disclosure Report, AO-10, attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

In 1986 I was designated Guilford County Co-Chairman for the campaign of Chief Justice Rhoda Billings to the North Carolina Supreme Court. I called local television stations, radio stations, and newspapers to invite them to a press conference in Guilford County when Justice Billings was announcing that she would be a candidate. I also attended several meetings with the other co-chairman.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Asociation's Code of Professional Responsibility

calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have never kept time records of my representation of persons whom I counseled at no charge or for a token fee. Time was of no consequence since I was not charging; and it did not occur to me that I would ever be asked about it.

I feel that it would be improper to give names since identification might equate to a breach of confidence.

Among those I have represented either at no charge or for a token fee are the following:

a) A twenty year old white male (referred to me by his doctor) who developed testicular cancer and whose hospital bills for surgery and chemotherapy inpatient care approximated $25,000.00. The auto body shop where this man worked had just changed Group Health insurance carriers. The old carrier denied coverage because its policy had expired before the cancer was diagnosed. The new company denied coverage, claiming it to be a "pre-existing condition" and excluded under the terms of the policy.

The hospital sued my client and I named the second insurance company as a third party defendant on the basis that the condition was not pre-existing. Also named as a third party defendant was an automobile dealer's association and its executive director who had told my client's employer that the second policy (which it offered as part of a group plan) would continue all coverage of the former policy without lapse. On the week of trial the case was settled with the hospital reducing its claim and the third party defendants paying all but $5,000.00 of the reduced claim. My client agreed to pay $5,000.00 to the hospital over a five year period.

My client had no assets and it would have been easy to recommend that he file bankruptcy but that would have adversely affected his credit. With the agreement of my firm, we charged no fee.

b) A young black male, semi-quadraplegic from a high school football injury. I have counselled with him for several years on civil and one criminal matter at no charge except for a reduced contingent fee in an automobile accident case. Several times a year Greta and I "loan" him small amounts of money.

c) Several years ago a young black male was placed by the Court in a supervised home because he would not obey his aunt with whom he lived. Greta and I became informal "big brother

- big sister", taking him out for ice cream, bowling, etc. Greta learned that he was to be the only occupant of the home with no place to go on Thanksgiving. Since we were not going to be in town, Greta arranged through friends for this young man, who was then in high school, to eat with a local family. They hit it off so well that a legal guardianship followed and the young man finished high school. A few years ago he came to us having designed an article he wanted patented. I set up an appointment, took him to a patent attorney, and paid the legal fee so that he would obtain the patent.

d) An Indian male whose teenage daughter had committed suicide - I helped him to get his money from a profit sharing plan and charged no fee.

e) A disabled, retired white male who, in self defense, had shot and killed his emotionally disturbed son, and was charged with murder. I represented him at no charge.

f) An elderly black couple whose only son was in prison. I corresponded with the son, researched his conviction which was in another part of the state, and wrote to the Board of Paroles. I charged no fee.

g) A white woman suffering from multiple schlerosis - I helped her obtain social security disability benefits and to settle an automobile accident case. No fee was charged either time.

h) A white family living below the poverty level - I represented both husband and wife on traffic charges. No fee either time.

i) A white family living below the poverty level - I represented and counseled them on several matters including drawing their wills and getting birth certificates for their daughters. No fee.

j) A black woman charged criminally with failure to report the existence of bank accounts while she was receiving AFDC payments. No fee.

k) A college student wrongly charged as a peeping tom. No fee.

l) A retired, disabled white man whom we represented for a token fee in settling his sister's estate.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the

practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I know of no organization to which I belong or have belonged which discriminates on the basis of race, sex or religion -- either through formal or practical implementation of membership policies.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circimstances which led to your nomination and interviews in which you participated).

There is no judicial selection commission in North Carolina. For several years I have been encouraged by various members of the Bar to seek appointment to the Federal Bench. I have not actively done so. I do not know, but I believe that I was recommended to Senator Helms by several lawyers. Neither Senator Helms nor anyone on his behalf has asked nor even suggested that I should position myself in any way, on any case, any issue or any question. The only commitment asked from me was that I work hard and maintain high integrity.

After Senator Helms recommended me to the President, I was invited to the Justice Department where I met with Joe Morris, James M. Spears, Stephen J. Markman, and John R. Bolton.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

In none of the meetings mentioned nor at any other time has anyone asked or received - direct or implied - any assurance with regard to my position on any case, question or issue.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far reaching orders extending to broad classes of individuals;

c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

My experience with the practice of law has been as a litigator, primarily in federal criminal cases and, civilly, in commercial and personal injury matters. My analytical perspective has been to determine whether the rule of law stated by a court was germane and applied to the facts of my case instead of whether the court was acting within the role properly accorded it.

My own view is that the proper role of a federal court is to be a forum in which the constitutional rights and liberties of all citzens regardless of race, sex or religion are protected. In being that forum the court must exercise sufficient remedial power to protect and vindicate the rights at issue. A right without a remedy, it has been said, is no right at all.

A court, however, does not have the manpower or fact gathering resources of a legislative body with committees and staff nor of an administrative agency. A court must primarily rely upon the litigants before it to marshal evidence and to advocate what ultimate facts should be found from often conflicting evidence and what remedies, if any, should properly be awarded. It is important therefore that a court's power be exercised only within the context of a live case or controversy and without the court's substitution of its view concerning the wisdom of an otherwise validly enacted law or regulation.

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
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Washington, DC 20036
(202) 331-2210

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NINTH CIRCUIT
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Seattle, WA 98101

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ELEVENTH CIRCUIT
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ABA/NET: ABA 461

May 3, 1988

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: NORWOOD CARLTON TILLEY, JR.
United States District Court
for the Middle District of North Carolina

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Norwood Carlton Tilley, Jr. for appointment as Judge of the United States District Court for the Middle District of North Carolina.

Our Committee is unanimously of the opinion that Mr. Tilley is "Well Qualified" for this appointment.

Sincerely yours,

Harold R. Tyler
Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

I. BIOGRAPHICAL INFORMATION (PUBLIC

1. **Full name (include any former names used.)**

Lewis Thornton Babcock

2. **Address: List current place of residence and office address(es).**

Home: 2036 Mesa Drive
Boulder, Colorado 80303

Office: Colorado Court of Appeals
2 East 14th Avenue, Room 365
Denver, Colorado 80203

3. **Date and place of birth.**

April 4, 1943
Rocky Ford, Colorado

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Judith Sharon Proctor Babcock
Teacher
Boulder Valley School District RE-2
6500 E. Arapahoe Avenue
Boulder, Colorado 80303

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

University of Denver
1961-1965
B.A.
Cum Laude

University of Denver Law School
1965-1968
J.D.

University of Virginia School of Law
1986-1988
L.L.M.

6. Employment Record: List (by year) all business and professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

6/66 to 9/66
Law Clerk
Rexford L. Mitchell
Attorney-at-Law
953 Swink Avenue
Rocky Ford, CO 81067

6/67 to 9/67
Law Clerk
Rexford L. Mitchell
Attorney-at-Law
953 Swink Avenue
Rocky Ford, CO 81067

9/67 to 3/68

Law Clerk
Edison & Berman
Attorneys at Law
820 16th Street
Denver, CO 80203

1968-1976

Mitchell & Babcock
Rexford L. Mitchell, Partner
General Practice
953 Swink Avenue
P. O. Box 471
Rocky Ford, Colorado 81067

1969-1974

City Attorney
City of Las Animas, Colorado

1970-1976

City Attorney
City of Rocky Ford, Colorado

1973-1976

Assistant District Attorney
Sixteenth Judicial District
Otero County Courthouse
3rd & Colorado
La Junta, Colorado 81050

1973-1976 (Approximate)

Farmers Home Administration
Escrow and Loan Closing Agent
202 S. 10th
Rocky Ford, Colorado 81067

1974 to 1976

Colorado Rural Legal Services, Inc.
Board of Directors

1976-1983

District Judge
Sixteenth Judicial District
Otero County Courthouse
3rd & Colorado
La Junta, Colorado 81050

1978-1983

Chief Judge
Sixteenth Judicial District
Otero County Courthouse
3rd & Colorado
La Junta, Colorado 81050

1983 to present

Judge
Colorado Court of Appeals
2 East 14th Avenue
Denver, Colorado 80203

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

Yes.
Dates: November 1968 to November 1974
Branch: Army--Colorado National Guard
Rank: E-6
Serial Number: 524-50-7900
Present status: Honorably Discharged

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Centennial Scholarship-Denver University 1962-1968
Intercollegiate Knights (Sophomore Scholastic Honorary Society)
Omicron Delta Kappa (Junior Scholastic Honorary Society)
Pi Gamma Mu (Social Science Honorary Society)
Phi Alph Theta (History Honorary Society)
Phi Beta Kappa (Liberal Arts Honorary Society)
Graduate, Denver University Centennial Scholars
  Honor Program, B.A., cum laude
Order of St. Ives (Law Scholastic Honorary Society)

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such group.**

Sixteenth Judicial District Bar Association

Member 1968 to present	
Secretary-Treasurer	1970
Vice President	1971
President	1972 & 1973

Denver Bar Association

Member	1986 to present

Colorado Bar Association

Member	1968 to present
Specialization Committee	1968-1970
Public Relations Committee	1969-1971
Special Committee on Long Range Planning	1975-1980

American Bar Association

Member	1968 to present
Judiciary Section	1984 to present

Colorado Judicial Planning Council Committee on Judicial Performance

Member	1979-1980

American Judicature Society

Member	1976 to present

Colorado District Judges Association

Member	1976-1983
Executive Committee	1982-1983

American Law Institute

Member	1984 to present

Civil Rules Committee of the Colorado Supreme Court

Member	1984 to present
Chair, Joint Civil and Criminal Appellate Rules Committee	1985 to present

Colorado Judicial Advisory Council to the Colorado Supreme Court

Member	1986 to Present
Chair, Subcommittee on Evaluation of Judicial Performance	1986 to 1987

American Inns of Court--Doyle's Inn

Member	1986 to present
Secretary	1987 to present

Colorado Bar Foundation

Member	1987 to present

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

Kappa Sigma Fraternity

Member	1962 to present
Beta Omicron Chapter Vice President	1963-1964

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

All Colorado State Courts	October 4, 1968
United States District Court for the District of Colorado	October 4, 1968
United States Court of Appeals for the Tenth Circuit	September 18, 1984

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

a) Comment, Rippey v. Denver United States National Bank and The Trustees Duty of Undivided Loyalty, 45 Den. L.J. 483.

b) Babcock, Musings on Establishing the Rural Practice, April Colo. Law. 1972 at 39.

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Excellent. May 27, 1988

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

1976-1983

District Judge--Appointed
Sixteenth Judicial District
Otero County Courthouse
3rd & Colorado
La Junta, Colorado 81050
General Jurisdiction

1978-198

Chief Judge--Appointed
Sixteenth Judicial District
Otero County Courthouse
3rd & Colorado
La Junta, Colorado 81050
General Jurisdiction

1983- Present

Judge--Appointed
Colorado Court of Appeals
2 East 14th Avenue, Room 365
Denver, Colorado 80203

Direct appeals as of right from all Colorado district courts and from administrative agencies designated by statute. Interlocutory appeals, appeals contesting the constitutionality of a statute or ordinance, Public Utilities Commission, and water court appeals are direct to the Colorado Supreme Court.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where you judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

(1) a. People v. Elliott, 675 P.2d 326 (Colo. App. 1983).

b. International Technical Instruments, Inc. v. Engineering Measurements Company, 678 P.2d 558 (Colo. App. 1983).

c. BCP Industries, Inc. v. State Board of Equalization, 694 P.2d 337 (Colo. App. 1984).

d. Barrett v. United Airlines, Inc., 697 P.2d 408 (Colo. App. 1985).

e. Reddick v. Craig, 719 P.2d 340 (Colo. App. 1985).

f. Conrad v. Imatani, 724 P.2d 89 (Colo. App. 1986).

g. People v. Koon, 724 P.2d 1367 (Colo. App. 1986).

h. Lockhart v. Board of Education 735 P.2d 913 (Colo. App. 1986).

i. People v. Tackett, 742 P.2d 957 (Colo. App. 1987).

j. Brown v. Colorado Springs, 749 P.2d 475 (Colo. App. 1987) and Collier v. Denver, 697 P.2d 396 (Colo. App. 1984).

(2) The following citations are to all appellate decisions reversing matters handled as a trial judge. (People v. Madson, 689 P.2d 639 (Colo. App. 1984) (Madson #3), affirms defendant's conviction and concludes one of my most difficult cases).

a. People v. Madson, 196 Colo. 507, 586 P.2d 1338 (1978) (Madson #1).

b. People v. Madson, 638 P.2d 18 (Colo. 1981) (Madson #2).

c. People v. Madson, 689 P.2d 639 (Colo. App. 1984) (Madson #3).

d. People v. Donachy, 196 Colo 289, 586 P.2d 14 (1978).

e. People v. Chavez, 629 P.2d 1040 (Colo. 1981).

f. People v. Root, 650 P.2d 562 (Colo. 1982).

g. People v. Hamilton, 662 P.2d 177 (Colo. 1983).

The following citations are to all Colorado Supreme Court reversals of opinions that I authored on the Colorado Court of Appeals. People v. Runningbear, Colo. App. No. 84CA0571 is unpublished, and therefore, attached.

a. Perlmutter v. Kobzina, 677 P.2d 381 (Colo. App. 1983), reversed, 706 P.2d 772 (Colo. 1985).

b. In re Marriage of Ward, 670 P.2d 1260 (Colo. App. 1983), reversed, 740 P.2d 18 (Colo. 1987).

c. Gordon v. Schneiker, 699 P.2d 3 (Colo. App. 1984), reversed, 732 P.2d 603 (Colo. 1987).

d. People v. Vialpando, 695 P.2d 1191 (Colo. App. 1984), reversed, sub. nom., 727 P.2d 1090 (Colo. 1986).

e. *Podleski v. Mortgage Finance*, 709 P.2[illegible] (Colo. App. 1985), *reversed*, *sub. nom.*, 742 P.2d [illegible] (Colo. 1987).

f. *Serdinski v. Serdinski*, 709 P.2d 69 (Colo. App. 1984), *reversed*, 740 P.2d 521 (Colo. 1987).

g. *City of Florence v. Powderhorn Constructors*, 716 P.2d 143 (Colo. App. 1985), *reversed*, *sub. nom.*, ___ P.2d ___ (Colo. 1988).

h. *People v. Fueston*, 717 P.2d 978 (Colo. App. 1985), *reversed*, 749 P.2d 952 (Colo. 1988).

i. *People v. Runningbear*, nonpublished, copy attached.

j. *In re Marriage of Grubb*, 721 P.2d 1194 (Colo. App. 1986), *reversed*, 745 P.2d 661 (Colo. 1987).

k. *Western Services v. Sargent School District*, 719 P.2d 355 (Colo. App. 1986), *reversed*, *sub. nom.*, 751 P.2d 56 (Colo. 1988).

(3) I have authored in excess of 560 opinions on the Colorado Court of Appeals. Of these, more than 280 have met the criteria for publication pursuant to C.A.R. 35, a copy of which is attached. Publication is the threshold standard of significance for question 15.(3). This court does not have jurisdiction to determine the constitutionality of a statute or ordinance. *Cf. Weitzel Redi-Mix v. Industrial Commission*, 728 P.2d 364 (Colo. App. 1986). The following cases are submitted in response to this inquiry.

a. *People v. Elliott*, 675 P.2d 326 (Colo. App. 1983).

b. *Fink v. Combined Communications Corp.*, 679 P.2d 1108 (Colo. App. 1984).

c. *People v. Arrington*, 682 P.2d P.2d 490 (Colo. App. 1983).

d. *Corbin v. Sinclair Marketing*, 684 P.2d 265 (Colo. App. 1984).

e. *Russell v. McMillen*, 685 P.2d 255 (Colo. App. 1984).

f. *Meuser v. Rocky Mountain Hospital*, 685 P.2d 776 (Colo. App. 1984).

g. *People v. Hamer*, 689 P.2d 1147 (Colo. App. 1984).

h. *BQP Industries v. Board of Equalization*, 694 P.2d 337 (Colo. App. 1984).

i. *City of Aurora v. Commerce Group Corp.*, 694 P.2d 382 (Colo. App. 1984).

j. *Collier v. City & County of Denver*, 697 P.2d 396 (Colo. App. 1984).

k. *Duran v. Lamm*, 701 P.2d 609 (Colo. App. 1984).

l. *People v. Koolbeck*, 703 P.2d 673 (Colo. App. 1985).

m. *Meyer v. Charnes*, 705 P.2d 979 (Colo. App. 1985).

n. *Deason v. Lewis*, 706 P.2d 1283 (Colo. App. 1985).

o. *Von Palffy-Eroed v. Bugescu*, 708 P.2d 816 (Colo. App. 1985).

p. *People v. Trujillo*, 710 P.2d 1169 (Colo. App. 1985).

q. *Reddick v. Craig*, 719 P.2d 340 (Colo. App. 1985).

r. *Salt River Project v. Board of Assessment Appeals*, 719 P.2d 368 (Colo. App. 1986).

s. *People v. Lucero*, 720 P.2d 604 (Colo. App. 1985).

t. *Hollingsworth v. Satterwhite*, 723 P.2d 169 (Colo. App. 1986).

u. *The Glenwood Post v. Glenwood Springs*, 731 P.2d 761 (Colo. App. 1986).

v. *Lockhart v. Board of Education*, 735 P.2d 913 (Colo. App. 1986).

w. *Colorado Civil Rights Comm. v. Conagra Flour Mill Co.*, 736 P.2d 842 (Colo. App. 1987).

x. *People v. Williams*, 736 P.2d 1229 (Colo. App. 1986).

y. *Mayberry v. University of Colorado*, 737 P.2d 427 (Colo. App. 1987).

z. *People v. Tackett*, 742 P.2d 957 (Colo. App. 1987).

aa. *Metropolitan v. Commerce City*, 745 P.2d 1041 (Colo. App. 1987).

bb. Brown v. Colorado Springs, 749 P.2d 4[illegible] (Colo. App. 1987).

cc. People in Interest of A.E., 749 P.2d 450 (Colo. App. 1987).

dd. People v. Paul, ___ P.2d ___ (Colo. App. 1988).

ee. Leavell-Rio Grande v. Board of Assessment Appeals, ___ P.2d ___ (Colo. App. 1988).

ff. People v. Duran, ___ P.2d ___ (Colo. App. 1988).

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (Chronologically) any unsuccessful candidacies for elective public office.**

1969-1974

City Attorney--Appointed
City of Las Animas, Colorado

1970-1976

City Attorney--Appointed
City of Rocky Ford, Colorado

1973-1976

Assistant District Attorney--Appointed
Sixteenth Judicial District
Otero County Courthouse
3rd & Colorado
La Junta, Colorado 81050

17. **Legal Career:**

a. **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

Did not serve as a clerk to a judge.

2. **whether you practiced alone, and if so, the addresses and dates;**

   N/A

3. **the dates, names and addresses of law firms of offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.**

   Summer of 1966

   Law Clerk
   Rexford L. Mitchell
   Attorney-at-Law
   953 Swink Avenue
   Rocky Ford, CO 81067

   Summer of 1967

   Law Clerk
   Rexford L. Mitchell
   Attorney-at-Law
   953 Swink Avenue
   Rocky Ford, CO 81067

   9/67 to 3/68

   Law Clerk
   Edison & Berman
   Attorneys at Law
   820 16th Street
   Denver, CO 80203

   1969-1974

   City Attorney
   City of Las Animas, Colorado

   1970-1976

   City Attorney
   City of Rocky Ford, Colorado

   1973-1976

   Assistant District Attorney
   Sixteenth Judicial District
   Otero County Courthouse
   3rd & Colorado
   La Junta, Colorado 81050

1968-1976

Mitchell & Babcock
Rexford L. Mitchell, Partner
General Practice
953 Swink Avenue
Rocky Ford, Colorado 81067

1973-1976 (Approximate)

Farmers Home Administration
Escrow and Loan Closing Agent
202 S. 10th
Rocky Ford, Colorado 81067

b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

Mitchell & Babcock was a two person, rural firm engaged in general practice. At the beginning, my practice included criminal defense appointments, as there was then no public defender system. From 1973 to 1976, I prosecuted criminal cases as the Assistant District Attorney for the Sixteenth Judicial District, which includes Otero, Bent, and Crowley Counties.

The civil side of the practice included various aspects of commercial law, real estate law, estate planning, probate, family law, commercial and tort litigation, debtor-creditor relationships, and bankruptcy. The agriculturally based economy, dependent on irrigation, required continual applications of Colorado water law. In addition, the general practice was supplemented by my service as city attorney for Rocky Ford and Las Animas. This practice of public law also included occasional aid to Rexford L. Mitchell, who served as Otero County attorney, Otero County Department of Social Services attorney, and Rocky Ford School Board attorney.

Finally, before and after the advent of Colorado Rural Legal Services, Inc., our firm regularly contributed pro bono services in all areas of our practice.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

Clients included individuals, partnerships, corporations, banking entities, governmental entities, charitable organizations, civic organizations, and one sterile bull.

c. 1. **Did you appear in court frequently, occasionally, or not all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

Regularly

2. **What percentage of these appearances was in:**

(a) federal courts;

5%

(b) state courts of record;

90%

(c) other courts.

5%, municipal courts

3. What percentage of your litigation was:

(a) civil;

50%

(b) criminal.

50%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I can only estimate the number of cases tried to verdict or judgment. In all but a few cases, I served as sole counsel or co-counsel. My best estimate is that I tried approximately 100 cases. As many or more trials to the court or jury were conducted before me as a judge of general jurisdiction in the Sixteenth Judicial District and in numerous other Colorado judicial districts.

5. What percentage of these trials was:

(a) jury;

35%

(b) non-jury.

65%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The following are eight cases that I personally tried as counsel or co-counsel, and two cases tried before me as a trial judge. These cases are representative of litigated matters I handled as an attorney, and in part, as a trial judge. See also answer 26.

While these cases are neither complex nor sophisticated, they reflect the best aspects of the justice system in rural Colorado. There, serious crime is rare and with few exceptions, criminal cases are usually resolved at the local level. Likewise, most civil cases are settled out of court or before trial, and there are few civil appeals.

1. People v. John Montano, No. C363. Otero County District Court. George Strain, 305 Santa Fe, La Junta, Colorado 81050, (719) 384-7719, District Attorney, and Ralph Wadleigh, Box 228, La Junta, Colorado 81050, (719) 384-5959, Deputy District Attorney. Judge William L. Gobin presiding.

John Montano was charged with felony assault in a barroom knifing of three young men in La Junta, Colorado in late 1968. As the new attorney in town, I was appointed to defend Mr. Montano, an elderly gentleman. Mr. Montano pled not guilty, a jury trial was set, and on November 21, 1968, the jury found Mr. Montano not guilty.

The verdict was obviously significant to Mr. Montano. It was significant to me because it was my first jury trial and one of my first fees. The fee for investigation and two or three days of trial was $75.

2. James Bailey and Jessie Roberts v. Letha DeVoss, No. 9397, Otero County District Court. Laurence A. Ardell, 314 Thatcher Building, Pueblo, Colorado 81003, (719) 545-0405, for the defendant. Judge Lawrence L. Thulemeyer, presiding.

I was retained by James Bailey and his mother, Jessie Roberts, to prosecute their negligence claim for an ankle injury and damages arising out of an intersection collision in La Junta, Colorado. Mrs. DeVoss had struck James Bailey as he was turning his motorcycle in the intersection. We were unable to settle the case.

Discovery involved approximately three depositions and one set of interrogatories. Following pretrial conference, the case was set for trial to a jury of six in late April 1970. The jury returned a verdict in favor of James Bailey for $20,210.84 and $1,690.06 for his mother, Jessie Roberts. This was a substantial verdict for the time, place, and injury. The judgment was not appealed.

Again, the case was naturally significant to the parties. It was significant to James Bailey because it provided him a fund for vocational education. It was significant to me because it established my credibility as a trial attorney and provided a sufficient fee to hire a secretary. Also, it established a format with my partner for handling future personal injury claims. Thereafter, Rex Mitchell was responsible for trying the legal aspects of the case and I handled the medical-legal aspects of the case.

3. People v. Leroy Gibson Van Horn, No. C430, Otero County District Court. Ralph N. Wadleigh, Box 228, La Junta, Colorado 81050, (719) 384-5959, for the prosecution. Judge William L. Gobin, presiding.

Mr. Van Horn, an itinerant from Pennsylvania, was employed by a trucker and rancher who left Mr. Van Horn in possession of his automobile while on a run. Mr. Van Horn and another person were arrested in North Las Vegas some days later with the automobile which contained a number of other items belonging to his employer. He was charged with grand theft.

His defense was that his employer had loaned him the automobile and he was returning to La Junta when arrested. These events occurred in approximately October 1970.

I was appointed to defend Mr. Van Horn. He pled not guilty and on November 22, 1970, following a two day jury trial, he was found not guilty. Other than the significance to Mr. Van Horn of the acquittal, and the $125 fee which I received for his defense, this case was significant because the Sixteenth Judicial District attorney's office began to consider plea bargaining with me in criminal cases.

4. Thomas Stjernholm v. Iraj Mazaheri, No. A438, Otero County District Court. Cover Mendenhall, deceased, for petitioner Thomas Stjernholm. Judge Robert Sanderson, Lamar, presiding.

This case involved one of the first step-parent adoption proceedings brought under the the Colorado Children's Code. See 1969, Perm. Supp. C.R.S. §22-4-7(1)(f)(I). I was retained by Mr. Mazaheri to contest the adoption because the affect of the decree would be to terminate his parent-child relationship with his daughter.

Mr. Mazaheri was, in all respects except for his failure to pay regular support, a model parent. His failure to pay support for a period of one year or more "without cause" was the basis for the petition.

Judge Sanderson, following trial on October 14 and 15, 1971, ruled against Mr. Mazaheri on the factual issue of "cause," but declared the statute unconstitutional as being in violation of Articles V and XIV of the United States Constitution, and Article 2, §25 of the Colorado Constitution. The Colorado Supreme Court reversed, and the adoption decree was entered. See Stjernholm v. Mazaheri, 180 Colo. 352, 506 P.2d 155 (1973).

The legal significance of the case is apparent from the supreme court's opinion. As a sequel, Mrs. Stjernholm later divorced Mr. Stjernholm, remarried, and was again divorced. Mr. Mazaheri moved to California and, as his natural daughter matured, reestablished a relationship with her.

This case is particularly significant to me because I regret not having petitioned the United States Supreme Court for certiorari on a pro bono basis.

5. People v. James Boyd Stuart, No. CR447, Prowers County District Court. Carl M. Shinn, 200 West Elm Street, P. O. Box 390, Lamar, Colorado 81052, (719) 336-4313, District Attorney. Judge John C. Statler, presiding.

I was retained by defendant's brother to defend Mr. Stuart against a charge of first degree arson. Mr. Stuart had been represented by Public Defender, Sheldon E. Emeson. Mr. Emeson withdrew three days before trial. I entered my appearance, obtained a short continuance, and, following jury trial on February 16, 1972, Mr. Stuart was acquitted.

The significance of the Montano, Van Horn, and Stuart cases lies in the simplicity of criminal practice in rural Colorado in the 1960's and early 1970's. Essentially, a defense involved a plea of not guilty and trial. There was no complex time-consuming motions practice. Most significant was the rural jury's ability to consider fairly whether the prosecution had met its burden of proof. My experience in this regard cemented my faith in the jury system.

6. People v. Ronald Ben Whatley, No. C750, Otero County District Court. Darol C. Biddle, 323 S. Union Avenue, Pueblo, Colorado 81003, (719) 542-1385 and James C. Damkar, 140 Central Main, Pueblo, Colorado 81003, (719) 545-2634 for the defense. Judge Lawrence L. Thulemeyer presiding.

Durant D. Davidson, P. O. Box 878, La Junta, Colorado 81050, (719) 384-4951 as District Attorney, and I as Assistant District Attorney, prosecuted Ronald Ben Whatley for first degree murder. Mr. Whatley pled not guilty by reason of insanity, and following a heated jury trial on the sanity issue, on August 14, 1974 the jury returned its verdict finding Mr. Whatley sane. Mr. Whatley thereafter pled guilty to one count of first degree murder.

This case was interesting because Mr. Whatley's defense was that his epilepsy rendered him insane only at the precise moment he shot the grocer during the course of an armed robbery. The expert testimony was complex and in sharp conflict. It is significant that there had not been a first degree murder prosecution in the Sixteenth Judicial District since the early 1950's, thus reflecting a general absence of serious crime in that part of Colorado.

7. People v. Gary Dexter, No. C956, Otero County District Court. Vasco G. Seavy, deceased, and Johnathan Gregory, address unknown, for the defense. Judge William L. Gobin, presiding.

Mr. Dexter, Fowler town clerk and treasurer, was charged with embezzling public funds. He had burned the town books and records before leaving for Las Vegas. It was thus necessary for the auditor to reconstruct the books for the period in question. This was done, in part, by mailing questionnaires to hundreds of town residents concerning their utility charges.

Proof of the embezzlement included admission of the auditor's opinion that town monies were missing. This opinion rested, in part, upon the responses to the auditor's letters of inquiry. At that time, Colorado had not adopted its counterpart to the Federal Rules of Evidence.

The trial judge admitted the auditor's opinion on my argument that under Federal Rule 703, the response to the auditors inquiry was information reasonably relied upon by experts in public audits in forming their opinions or inferences about the audit.

The jury returned a guilty verdict. However, Judge Gobin granted defendant's motion for new trial on the basis that he had erred in admitting the opinion.

I replaced Judge Gobin in June 1976. and the new district attorney, Steven A. Tisdel, 300 Q/W Victor Avenue, Box 406, Victor, Colorado 80860, (719) 579-9756, again tried Mr. Dexter. That trial, absent the auditor's opinion, resulted in a hung jury. Following a third trial, Mr. Dexter was acquitted. Mr. Tisdel's theory was that Mr. Dexter had embezzled public funds only by burning the city books. CRE 703, and case authority since its adoption, show that the original argument for the admission of the auditor's opinion was sound.

This case is significant as one of a series of local embezzlement cases that I prosecuted.

8. People v. Dora Esquibel, No. C907, Otero County District Court. George McLachlan, 110 E. Oak, Box 1298, Lamar, Colorado 81052, (719) 336-2974, for the defendant. Durant D. Davidson, P. O. Box 878, La Junta, Colorado 81050, (719) 384-4951, District Attorney and I for the People. Judge William L. Gobin, presiding.

This case arose out of a series of sporting goods store burglaries. Arms and ammunition were taken in each burglary. Investigation of these burglaries led to the discovery of stores of dynamite, arms, and ammunition.

Dora Esquibel was arrested for complicity in the burglaries and for theft by receiving. Her son, Randy Esquibel, was separately prosecuted in connection with the burglaries.

On April 6, 1975, the jury returned its verdict finding defendant guilty of accessory to burglary and theft by receiving.

This case is significant because it is representative of civil unrest in the mid and late 70's.

9. People v. Leslie Gooley, 76CR5231, Denver District Court. Christopher J. Munch, 1701 Arapahoe St., Golden, Colorado 80401, (303) 278-6100, Deputy District Attorney, for the prosecution. Alvin D. Lichtenstein, 423 Eudora, Denver, Colorado 80220, (303) 321-8613, Deputy Public Defender for the defense at trial.

Following a first degree felony murder conviction, trial judge Joseph R. Quinn, granted a new trial because of prosecutorial misconduct. The offending prosecutor was removed and Christopher J. Munch prosecuted the second trial. Judge Quinn had a conflict and I was assigned by the Colorado Chief Justice to preside at Mr. Gooley's retrial.

Following my grant of a severance motion to a co-defendant, the case proceeded to trial before a sequestered jury. Mr. Gooley was convicted of first degree felony murder and other counts arising out of the robbery. The judgment of conviction was appealed, and in a nonpublished opinion, the judgment was affirmed. On appeal, Mr. Gooley was represented by Theodore A. Borrillo, 5353 W. Dartmouth Avenue, #510, Denver, Colorado 80227, (303) 985-888, and David A. Sorenson, 1525 Sherman Street, Room 550, Denver, Colorado 80203, (303) 866-3837. Mr. Gooley later filed a Crim. P. 35 motion, which I denied. That judgment was again appealed by Mr. Borrillo and was affirmed in an unpublished opinion. Copies of the unpublished opinions are attached.

This case is significant because it demonstrates the distinction between the more simplistic early criminal practice in rural Colorado and the highly sophisticated later motions, trial, and appellate criminal practice, particularly in the Denver metropolitan area.

10. *Theresa L. Brunelli and Angelo Brunelli v. Stanley H. Biber, Trinidad Area Health Association, and Hanns C. Schwyzer, No. 2411.* Las Animas County District Court. Daniel M. Haskell, 3003 E. 3rd Avenue, #201, Denver, Colorado 80206, (303) 321-3516, for plaintiffs. Peter W. Pryor, 6200 S. Syracuse Way, Englewood, Colorado 80111, (303) 771-6200, for Drs. Biber and Schwyzer.

Lee Wills, 310 Holly Sugar Building, Colorado Springs, Colorado 80903, (303) 633-8500, for Trinidad Area Health Association.

I was assigned by the Colorado Chief Justice to preside in this medical malpractice action. Following discovery and pretrial conference, jury trial was held November 5 to 7, 1979. A verdict was returned for Theresa L. Brunelli, in the sum of $10,000, and $5,000 for Angelo Brunelli.

This case reflects the beginning of sophisticated malpractice prosecution and defense practice involving extensive discovery and motions practice. It also represents a growing tendency for metropolitan specialists to extend practice to rural parts of the state. (Unfortunately, I never learned why, in the Las Animas District Courtroom, there exists a fourteen person jury box both to the right and to the left of the bench.)

19. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

In an age of specialization, it seems significant that there remains a role for a general practitioner. My practice, as such, provided a broad depth of experience that I would like to think made me a better trial and appellate judge. Both the trial and appellate courts where I have served demand application of a wide range of legal principles to all fields of law. Judicial service in a metropolitan area leads me to conclude that there remains a valuable role for general practitioners, not only in rural areas, but cities as well. Thus, the generalists' pursuit of the law through practice and judicial service is most significant overall.

I attach specific significance to the pro bono legal services that I provided to help establish the Rocky Ford Housing Authority, secure funding for low cost housing through the Farmers Home Administration and Colorado Department of Housing, construct the housing, and help guide the Authority through its early years.

Also significant to me is my participation in the development and establishment of a system for statewide evaluation of judicial performance.

In 1979 and 1980, I served on a subcommittee of the then Judicial Planning Counsel of the Colorado Supreme Court that studied evaluation of judicial performance. The charge was to develop a plan for evaluation of Colorado judges as a necessary adjunct to the Colorado Judicial Selection and Tenure System. In August 1980, this committee, known as the Hoffman Commission, issued its report. No further action was taken.

In 1985, the Colorado Judicial Advisory Council to the Colorado Supreme Court was formed. I chaired a subcommittee on evaluation of judicial performance that developed and drafted proposed legislation to implement a statewide system of judicial evaluation to inform voters of judicial performance in advance of each retention election.

In 1987, Senate Bill No. 151 passed the Colorado Senate but died in the House during the 56th General Assembly. With few changes, House Bill 1079 was passed by the 57th General Assembly and approved by Governor Romer on May 12, 1988. A copy is attached.

I actively supported passage of this legislation and, when called upon, testified in its support before various Colorado House and Senate committees.

It is difficult, if not impossible to attach particular significance to any one or more specific matters handled as an attorney or a judge. Obviously, each is significant to the litigants. However, each is significant to the justice system generally, because the quality of justice afforded each case is a reflection of that system.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   Public Employee's Retirement Association--(See Attached)

   Colorado National Bank of Denver--IRA #5498/000797693-0

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   Twelve years service as a state trial judge, coupled with a modest and uncomplicated financial situation, has reduced the potential for conflicts of interest. However, any conflict or appearance of impropriety that may arise would be resolved by recusal or divestment.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   No

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

   See attached Ethics in Government Report

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

No

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

General practice in Rocky Ford, Colorado included regular pro bono representation of the disadvantaged. See answer 17.b.1, supra. For example, I represented one elderly widow who wished to convey a modest parcel of realty. Title was clouded because no estate proceeding had occurred. She refused my offer of free legal services so she was charged the court costs and a nominal fee of $10.00. Another example is pro bono service provided an elderly man who had no birth certificate and required proof of citizenship to qualify for Social Security. Yet another would be an adoption of an abandoned grandchild by its indigent grandparents.

Often, when Legal Services represented one spouse in a marriage dissolution, our firm would provide pro bono services for the other. Criminal defense appointments were also accepted. See answer 18.(c), supra.

In addition, our representation of local governmental bodies was at one-half our normal hourly fee. My representation of the Rocky Ford Housing Authority, see answer I.19., supra, was initially without charge. Free legal services were also provided the Rocky Ford Methodist Church in connection with its land requisition and construction of a new house of worship. These instances are not exclusive. Rather, in answer to this question, they are given as examples.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

At one time, Rotary International refused women admission to membership. I have not been a member since 1983 because of this policy. I applaud the recent Supreme Court decision that overturns that policy. Member, 1969 to 1983.

In 1968 or 1969 I was initiated into the Rocky Ford Elks Club where my grandfather was a charter member. That was the only meeting I attended. After going on the Sixteenth Judicial District Court, I resigned because I felt continued membership in Elks was inappropriate with judicial service.

The Kappa Sigma social fraternity probably, at one time, limited membership to male, white, Christians. At the University of Denver I, and others, successfully supported admission of Jewish members. I have not been active since college and I have no knowledge of its current practices. Member, 1962 to present.

Otherwise, I have no knowledge of past or present memberships that would contravene this ABA code commentary.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

On September 1, 1987, Colorado Senator William L. Armstrong announced appointment of a judicial nominee review committee, consisting of attorneys. My application was encouraged by the chairman's letter to me on September 4, 1987. The application form was submitted September 16, 1987 and the full committee interviewed me on September 20, 1987. I was later interviewed by Senator Armstrong on September 27, 1987.

The Senator later informed me that he wished to submit my name to the Justice Department for its review. I consented, and on October 6, 1987, I was interviewed at the Justice Department in Washington by an Assistant Attorney General, two Deputy Associate Attorneys General, and one Attorney Advisor.

On January 11, 1988, the Justice Department informed me by letter that the White House had selected another aspirant for nomination to the Federal District Court for the District of Colorado.

When Judge Kane retired from this court in March 1988, Senator Armstrong contacted me, and I again agreed to his submission of my name to the Justice Department for review.

Following further telephone interviews with the Justice Department, in mid-April 1988, I was informed by a May 5 letter that my nomination process would begin.

Since that time, I was interviewed by two FBI agents and on June 9, 1988 by the Tenth Circuit representative of the American Bar Association.

One June 23, 1988 I was honored by the President's call informing me of my nomination to the Colorado Federal District Court.

4. Has anyone involved in the process of selecting you has a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

   No

5. Please discuss your views on the following criticism involving "judicial activism."

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject to increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

   Some of the characteristics of this "judicial activism" have been said to include

   a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

   b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

   c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

   d. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

   In deference to the constitutional doctrine of separation of powers, my lodestar in practice and judicial service has been that broad policy determinations are within the province of the legislature. Likewise, execution of legislative policy is within the province of the executive branch of government. Courts are not equipped to do either and may not constitutionally usurp legislative or executive function.

Accordingly, courts should resolve only the actual case and controversy presented. Opinions and orders should be drawn narrowly to accomplish this end.

Judicial resources are limited. Thus, in addition to inviting charges of usurpation of legislative or executive function, overbroad orders and court administration of institutions unbearably stress limited judicial resources. This fosters delay in bringing to a final conclusion cases and controversies that are properly before the courts. Finally, to assure the existence of an actual case and controversy courts should be assured of standing and ripeness. See Traxler v. Board of Trustees, 701 P.2d 607 (Colo. App. 1984) (Babcock, J., author).

10. **Have you ever been sued by a client or other party? Have you ever been a party to any litigation? If so, give full particulars.**

No

11. **Please advise the Committee of any unfavorable information that may affect your nomination.**

None

AFFIDAVIT

I, ______________, do swear that the information provided in this statement is, to the best of my knowledge; true and accurate.

June 24 1988
(DATE)

(NAME)

Carolyn Kay [illegible]
(NOTARY)

Exp: 10-29-88

AO-10
Rev. 8/87

FINANCIAL DISCLOSURE REPORT

Annual Report Due by May 15 from Judicial Officers and certain Judicial Employees (28 USCA App. I, §§ 301-09)

Person Reporting (Last name, first, middle initial) Babcock, Lewis T.	Court or Organization	Date of Report 6/23/88
Title Judicial Nominee for United States District Court for the District of Colorado	Date of Entry/Nomination/Termination (only if initial or final report) June 23, 1988	Reporting Period (Calendar year, or inclusive dates) 1/1/87 to 6/23/88
Home or office address (O) Colorado Court of Appeals 2 E. 14th Avenue, Suite 365 Denver, Colorado 80203		

IMPORTANT NOTES: *Please read the instructions accompanying this form. The report should include information pertaining to your spouse and dependent children, if any. Attach additional sheets if needed, identifying each attachment by showing your name, the date of the report, and the section(s) being completed.* **Complete all sections, checking the NONE box for each section where you have no reportable information.** *Compare and reconcile this report with last year's and list items in the same order as last year. Type or print clearly. Sign on last page.*

I. POSITIONS. *(Reporting individual only; see pp. 15-16 of Instructions.)*

☐ NONE (No reportable positions)

POSITION	NAME OF ORGANIZATION/ENTITY
Co-trustee	Robert T. Babcock Revocable Trust
Co-trustee	Martha L. Babcock Revocable Trust
Custodian	For John T. Babcock, Colorado Uniform Gift to Minors Act
Custodian	For Katherine Babcock, Colorado Uniform Gift to Minors Act

II. AGREEMENTS. *(Reporting individual only; see p. 17 of Instructions.)*

☐ NONE (No reportable agreements)

DATE	PARTIES AND TERMS
June 1976	State of Colorado:- Statutory provisions providing for retirement benefits from the Colorado Public Employees' Retirement Association

III. NON-INVESTMENT INCOME. *(Partial disclosure for spouse; see pp. 18-20 of Instructions.)*

☐ NONE (No reportable non-investment income)

	DATE (Honoraria only)	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1		State of Colorado -- Salary	$
2		(January 1, 1987 - December 31, 1987 = $58,500	$
3		January 1, 1988 - June 30, 1988 = $31,500	$90,000
4			$
5			$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting: Lewis T. Babcock

Date of Report: 6/23/88

IV. REIMBURSEMENTS and GIFTS--transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

☐ NONE (No such reportable reimbursements or gifts)

	SOURCE	DESCRIPTION
1	State of Colorado	Transportation, lodging, and food
2	University of Virginia	Lodging and food
3	American Inns of Court #19, Doyle's Inn	Transportation, lodging, and food
4		
5		
6		
7		
8		

V. OTHER GIFTS. *(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)*

☒ NONE (No such reportable gifts)

	SOURCE	DESCRIPTION	VALUE
1			$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 22-24 of Instructions.)*

☐ NONE (No reportable liabilities)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	First Industrial Bank of Rocky Ford, Colorado	Note (J)	L
2			
3			
4			
5			
6			
7			

* VALUE CODES:

J = $0 to $1,000
K = $1,001 to $5,000
L = $5,001 to $15,000
M = $15,001 to $50,000
N = $50,001 to $100,000
O = $100,001 to $250,000
P = over $250,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting: Lewis T. Babcock

Date of Report: 6/23/88

VII. INVESTMENTS and TRUSTS--income, value, transactions. *(Includes th[illegible] [illegible]se: partial disclosure for dependent children; see pp. 24-35 of Instructions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure.	B. Income during period: Amt. Code[1] (A-H)	B. Income during period: Type (e.g., div.)	C. Gross value at end of period: Value Code[2] (J-P)	C. Gross value at end of period: Value Method Code[3] (Q-W)	Transactions during period (Reporting individual and spouse): Type (e.g., sold)	If not exempt from disclosure: Date: Month-Day	Value Code[2] (J-P)	Gain Code[1] (A-H)	Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1 Westinghouse Corp.	B	Div.	L	T					
2 Double Eagle Petroleum & Mining Co.	A		J	T					
3 K.R.M. Petroleum Co.	A		J	T					
4 jhi, Inc.	A		J	T					
5 Ideal Basic Industries (DC)	A		J	T					
6 Ideal Basic Industries (DC)	A		J	T					
7 Iowa Resources, Inc. (DC)	B	Div	K	T					
8 Iowa Resources, Inc. (DC)	B	Div.	K	T					
9 Colorado National Bank Boulder (J)	B	Int.	K	T					
10 Colorado National Bank Denver	A		J	T					
11 Colorado National Bank Denver (DC)	B	Int.	B	T					
12 Colorado National Bank Denver (DC)	B	Int.	L	T					
13 Boulder Valley Schools Credit Union (S)	B	Int.	J	T					
14 Colorado Public Employees Retirement Association	A		M	V					
15 Colorado Public Employees Retirement Association (S)	A		M	V					
16 Colorado Nat'l Bank Denver IRA #5498/000797392-6	A		K	T					
17 Colorado Nat'l Bank Denver IRA #5498/000797693-0 (S)	A		K	T					
18 Otero Savings & Loan Assoc. IRA #01-08090328 (S)	A		K	T					
19 Otero Savings & Loan Assoc. IRA #01-07090055 (S)	A		J	T					
20 Lot 331 (J) See attached legal description	A		L	W					

1 Income/Gain Codes: A = exempt ($0 to $100) B = $101 to $1,000 C = $1,001 to $2,500 D = $2,501 to $5,000 E = $5,001 to $15,000 F = $15,001 to $50,000 G = $50,001 to $100,000 H = over $100,000

2 Value Codes: J = exempt ($0 to $1,000) K = $1,001 to $5,000 L = $5,001 to $15,000 M = $15,001 to $50,000 N = $50,001 to $100,000 O = $100,001 to $250,000 P = over $250,000

3 Value Method Codes: Q = Appraisal R = Cost (real estate only) S = Assessed value T = Cash/market U = Book value V = Other W = Estimated

Lot 331 on Record of Survey captioned "Record of Survey of Sec. 33, Twp. 6 South, Rng. 5 East, and the West 1/2 of the West 1/2 of the Fractional Section 3 and a portion of the East 1/2 of the East 1/2 of Sec. 9, Twp. 7 South, Rng. 5 East, SBB& M, as shown by Map on file in Book 31, pp. 39 to 43 inclusive, of Records of Survey, Riverside County of Records, California. Lewis T. Babcock and Judith S. Babcock, joint tenants--Date of Value May 24, 1988
$7,500

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
Lewis T. Babcock	6/23/88

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. *(Indicate section of Report.)*

☐ **Check to affirm that differences in investments from those reported in prior year are exempt from disclosure.**

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

Signature Lewis T Babcock Date 6/23/88

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (28 U.S.C.A. APP. I, § 304, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

1. *Mail signed original and 4 additional copies to:*

   Judicial Ethics Committee
   Administrative Office of the
   United States Courts
   Washington, DC 20544

2. *Deliver one copy to the Clerk of the Court on which you sit or serve. (Judicial employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center, need not file a copy with any court.)*

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS *		LIABILITIES ***	
Cash on hand and in banks **	89815 00	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
		Notes payable to relatives	
Listed securities—add schedule	10072 00	Notes payable to others	16845 00
Unlisted securities—add schedule		Accounts and bills due	
Accounts and notes receivable:		Unpaid income tax	
Due from relatives and friends		Other unpaid tax and interest	
Due from others		Real estate mortgages payable—add schedule	109403 00
Doubtful			
Real estate owned—add schedule	145500 00	Chattel mortgages and other liens payable	
Real estate mortgages receivable			
Autos and other personal property	69000 00	Other debts—itemize:	
Cash value—life insurance			
Other assets—itemize:			
Powell Kontney-Oil painting	7500 00		
Stamp Collection	10000 00	Total liabilities	126248 00
		Net worth	205639 00
Total assets	331887 00	Total liabilities and net worth	331887 00

CONTINGENT LIABILITIES	NONE	GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule.)	No
On leases or contracts		Are you defendant in any suits or legal actions?	No
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

* See Schedule A
** Includes retirement accounts
*** See Schedule B

II. C. Financial Statement

SCHEDULE A - ASSETS

(1) Bank Accounts

Colorado National Bank Boulder Joint Checking #2-7030-6 (average balance)	$3,000
Colorado National Bank Boulder Joint Checking #60-1789-3 (inactive)	
Colorado National Bank Boulder Growth Reserve #2207-20-9 (average balance)	$4,000
Colorado National Bank Denver Personal Checking #0328-39-1 (average balance)	$100
Colorado National Bank Denver Growth Reserve #5467-77-2 (average balance)	$500
Colorado National Bank Denver Lewis T. Babcock in trust for John T. Babcock Growth Reserve #5450-72-1	$127
Colorado National Bank Denver Lewis T. Babcock in trust for Katherine Babcock Growth Reserve #5450-70-5	$11,275
Otero Savings & Loan Association Lewis T. and Judith S. Babcock in trust for Katherine Babcock Savings #01-26003003	$1,600
Boulder Valley Schools Credit Union Judith S. Babcock #6826-9	$300

(2) Retirement Accounts

PERA--Lewis T. Babcock May 31, 1988	$42,590
Colorado National Bank Denver-Lewis T. Babcock IRA 5498/000797392-6 December 31, 1987	$4,134
PERA--Judith S. Babcock May 31, 1988	$16,377
Colorado National Bank Denver-Judith S. Babcock IRA 5498/000797693-0 December 31, 1987	$3,561

Schedule A--Page 2

Otero Savings & Loan	
Judith S. Babcock	
#01-07090055--Retirement Savings	$593
#01-08090328--Retirement Savings	$1,658

(3) Real Estate

Lot 2, Hunsinger Subdivision, The plat of which is recorded as Plan File P11, F1, No. 37. Lewis T. Babcock and Judith S. Babcock, joint tenants	$138,000
Lot 331 on Record of Survey captioned "Record of Survey of Sec. 33, Twp. 6 South, Rng. 5 East, and the West 1/2 of the West 1/2 of the Fractional Section 3 and a portion of the East 1/2 of the East 1/2 of Sec. 9, Twp. 7 South, Rng. 5 East, SBB& M, as shown by Map on file in Book 31, pp. 39 to 43 inclusive, of Records of Survey, Riverside County of Records, California. Lewis T. Babcock and Judith S. Babcock, joint tenants.	$7,500

(4) Securities

Lewis T. Babcock	
Westinghouse Corporation 100 @56 1/8	$5,612
K.R.M. Petroleum Company 200 @1.00	200
Double Eagle Petroleum & Mining Co. 40 @1 1/8	45
ihi, inc. (no market/no par)	0
Custodian for John T. Babcock	
Ideal Basic Industries, Inc. 32 @2 7/8	92
Iowa Resources, Inc. 113.6156 @16 3/4	$1,903
Custodian for Katherine Babcock	
Ideal Basic Industries, Inc. 28 @2 7/8	80
Iowa Resources, Inc. 127.8189 @16 3/4	$2,140

(5) Autos and Other Personal Property

1986 Volvo (Lewis T. & Judith S. Babcock)	$12,000
1982 Volvo (Lewis T. & Judith S. Babcock)	5,000
1972 Volvo (Lewis T. Babcock)	1,500
1963 Volkswagen (John T. Babcock)	500
Furniture, appliances, miscellaneous art, and jewelry	$50,000
Stamp Collection	$10,000
Powell Kontney--Oil Painting	$ 7,500

SCHEDULE B - LIABILITIES

(1)	Note payable to Great American Mortgage Corporation, a California corporation dated December 3, 1986 in the principal amount of $110,400.00 bearing interest at 9.375% and payable in monthly installments of $918.26 from February 1, 1987 to January 1, 2017. This note is secured by a first deed of trust on my residence, lot 2, Hunsingers Subdivision. (See C.2.(A) above). Principal Balance--5/31/88	$109,403
(2)	Unsecured note payable to First Industrial Bank of Rocky Ford, Colorado payable in 60 monthly installments of $311.00 beginning 11-1-86. Principal Balance--5/31/88	$10,721
(3)	Boulder Valley Schools' Credit Union, Account #6826-9. Payable in monthly installments ending July 1989.	$ 6,124

ABA

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(202) 331-2210
ABA/NET: ABA 461

July 6, 1988

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: LEWIS T. BABCOCK
United States District Court
for the District of Colorado

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Lewis T. Babcock for appointment as Judge of the United States District Court for the District of Colorado.

Our Committee is unanimously of the opinion that Judge Babcock is "Well Qualified" for this appointment.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

CONFIRMATION HEARING ON: RICHARD L. NYGAARD AND ALEX R. MUNSON

WEDNESDAY, AUGUST 10, 1988

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 6:44 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Paul Simon (acting chairman) presiding.

Also present: Senators Thurmond and Specter.

Staff present: Steven J. Metalitz, chief nominations counsel; Andrew Rainer, investigative counsel; and Frank Klonoski, minority investigator.

Senator Simon. The committee will come to order, and let me apologize for keeping you waiting here, but things have been a little hectic around here these last few days.

I understand that the Resident Representative of the Commonwealth of the Northern Mariana Islands is here to introduce one of our nominees. Would you come forward, please, together with Judge Munson?

Please have a seat, both of you, and, Mr. Tenorio, we will ask you to make your brief statement.

STATEMENT OF THE HON. FROILAN C. TENORIO, RESIDENT REPRESENTATIVE, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Mr. Tenorio. Thank you, Mr. Chairman.

My name is Froilan Cruz Tenorio and I am the elected Resident Representative to the United States from the Commonwealth of the Northern Mariana Islands. It is indeed a privilege to appear before you today to introduce Judge Alex Munson to the committee.

I have submitted a written statement for the record which, with your permission, I would like to summarize at this time.

Mr. Chairman, Judge Munson has spent the last 6 years as Chief Judge of the High Court of the Trust Territory of the Pacific Islands. In that capacity, he has also served on appellate panels of the U.S. District Court to which he has now been nominated. He has lived among us for these years, and now is making a long-term commitment to serve our people as our Federal judge.

Among its other functions, the District Court for the Northern Mariana Islands serves as the principal interpreter of our covenant with the United States. I believe we are placing the covenant in good hands with Judge Munson. Indeed, he has the bipartisan endorsement of all our elected leaders.

I urge that the committee meet promptly to send his nomination to the full Senate with a recommendation of approval, and that floor action be scheduled at the earliest possible date.

Now, on behalf of the people of the Northern Mariana Islands, I take great pleasure in introducing to the committee the Honorable Alex R. Munson.

Thank you.

[The statement of Mr. Tenorio follows:]

STATEMENT OF FROILAN CRUZ TENORIO
RESIDENT REPRESENTATIVE TO THE UNITED STATES
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

REGARDING THE APPOINTMENT OF ALEX R. MUNSON
TO THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS

AUGUST 10, 1988

Thank you, Mr. Chairman. As the elected representative of the people of the Northern Mariana Islands to the United States, it is indeed a privilege to appear before you today to introduce Judge Alex Munson to the Committee.

As you know, nearly two years ago President Reagan took the final step to complete the union between our peoples by proclaiming the Northern Mariana Islands to be a Commonwealth of the United States and extending U.S. citizenship to those among us who did not already enjoy that coveted status. This union was the result of our freely-negotiated expression of sovereignty embodied in our Covenant with the United States. The Covenant is unique, as is our relationship, in that the U.S. has guaranteed our self-government and agreed to limit its powers so that the fundamental provisions of the Covenant can be changed only by mutual consent.

The Covenant provided for the creation of my office and its official recognition by all of the departments and agencies of the Government of the United States. At the same time, the Covenant created the District Court for the Northern Mariana Islands. In addition to handling the usual federal and diversity cases, the court fulfills three other important functions.

The District Court has original jurisdiction over local causes of action which are not assigned by our Constitution or laws to a local court. Also, until we establish our own appellate court, the District Court serves that function for all local cases.

Most importantly, however, the District Court for the Northern Mariana Islands serves as the principal interpreter of the Covenant itself, clarifying misunderstandings and resolving differences both between the Commonwealth and Federal Governments and among private parties.

Since this function goes to the very fabric of our relationship with the United States and our rights as members of the Union, it is important that the judge of the district court have an intimate knowledge of our islands, our cultural traditions, and of course the Covenant.

I am pleased to say that you have such a judge before you as the nominee for appointment to the District Court for the Northern Mariana Islands. Alex Munson has spent the last six years as Chief Judge of the High Court of the Trust Territory of the Pacific Islands. In that capacity, he has also served on appellate panels of the U.S. District Court to which he has now been nominated. He has lived among us for these years, and now is making a long-term commitment to serve our people as our federal judge for many years to come.

We do not lightly put our fate into the hands of an individual who is not native to our islands. In this case, I am confident that Judge Munson has demonstrated the sensitivity and even-handedness to help us towards a mature and fulfilling political relationship with the United States. I am certain that there will be times when we will not agree with some of his decisions, but we will respect them because we respect him and count him as a friend.

Mr. Chairman, Judge Munson has the bipartisan endorsement of all our elected leaders. I urge that the Committee meet promptly to send his nomination to the full Senate with its recommendation of approval and that floor action be scheduled at the earliest possible date.

Now, on behalf of the people of the Northern Mariana Islands, I take great pleasure in introducing to the Committee the Honorable Alex R. Munson and recommend that the Senate advise and consent to his appointment to the District Court for the Northern Mariana Islands.

Thank you.

Senator SIMON. Thank you very much.

Judge Munson, do you have any family members or friends you wish to introduce here?

Judge MUNSON. Yes, I do, Mr. Senator. I would like to introduce my wife, Kathy Munson, and I would also like to introduce David Kahn, who is the legal counsel to Representative Tenorio.

Senator SIMON. We are very happy to have both of you with us, and we thank you very much. We will be happy to have you stay for the hearing, but if you wish to leave, you may. Judge Munson, you may leave the witness table temporarily.

Judge MUNSON. Thank you.

Senator SIMON. Let me ask Mr. Nygaard to come forward, and call on our colleague, Senator Heinz. Let me add, in case Senator Specter is not able to be here, he was planning on being here to put in a good word and I know he is strongly supportive.

Senator Heinz.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Well, Mr. Chairman, Senator Simon, first let me thank you very much for your willingness and ability to hold this expedited hearing this evening. It will mean a great deal to the expeditious handling of the nominations that I know you have under review.

Please express my particular appreciation to the acting chairman, Senator Kennedy, and to Pat Leahy, who has done duty, as you are this evening, on so many occasions.

I know that I do speak for my colleague, Senator Specter, when I say it is my privilege to join in introducing Judge Richard Nygaard as the President's nominee to fill a current vacancy on the U.S. Appeals Court for the Third Circuit.

Let me give you a little bit of his background, but I would ask unanimous consent that my entire statement be a part of the record as if given in full.

Senator SIMON. It will be entered in the record.

Senator HEINZ. Mr. Chairman, Judge Nygaard has served on the Erie County Court of Common Pleas since 1980. He was appointed to that position by a man we had here a few days ago, Dick Thornburgh, when he was Governor of our State.

He was subsequently confirmed, Judge Nygaard, by the Pennsylvania State Senate. In 1983, he ran for election in the position of judge. He won election to a full 10-year term on the County Court of Common Pleas. It is a mark of the high regard in which he was held by his constituents that he received the nominations of both the Republican and Democratic parties.

He is a graduate of the University of Michigan Law School. He was a specialist in bankruptcy law when he was in private practice. He was a county councilman at one point in Erie County, and over the past years he has been recognized in so many ways for a variety of undertakings, very unselfish ones, in the nature of commitments to his community.

These include awards from the Multiple Sclerosis Society, the Erie County Grange, which gave him the Community Service

Award of the Year. He was recipient of Mayor Lou Tullio's Celebrated Citizen Proclamation, proclaiming Judge Nygaard Day in Erie in 1982.

He has been recognized not only locally—and I cited only a few local recognition awards that he has received—but in 1982, President Reagan appointed Judge Nygaard as the only American judge to serve as a delegate to the 35-nation International Conference on Free Elections, which was sponsored jointly by the U.S. State Department and the American Enterprise Institute.

Now, Mr. Chairman, Judge Nygaard has arrived, as we are all aware, at the penultimate step to elevation to the Federal appeals court through a personal history that, in my judgment, is about as American as apple pie.

First of all, he was born in the kind of place that every American thinks of as a typical small town. At least, Thief River Falls, MN, hardly sounds like a giant metropolis to me. That is his birthplace, and you wonder whether a judge should be from Thief River, but maybe they had a lot of practice putting them in jail there.

In any event, Judge Nygaard has held a variety of jobs, as he was working his way through high school and college, as a shoeshine boy, a soda jerk, a paper boy, a ranch hand, a salesman, a gas station attendant, a carpenter, a bus driver, a librarian, a truck driver.

And I think it is fair to say that as a Federal judge, Judge Nygaard will bring, in addition to superb legal training, a firsthand familiarity with typical Americans and the way those Americans live.

It also needs to be stated—I want to note for the record that Judge Nygaard was first brought to the attention of the Justice Department by a bipartisan merit selection commission established by Senator Specter and me, and at that time Judge Nygaard had been recognized by the Federal Judicial Nominating Commission that we constituted as being among the very best for appointment to Federal district judge.

Mr. Chairman, I think it is clear from the record that Judge Nygaard possesses all the qualifications of legal experience and judicial temperament that anyone would want a nominee to have for appointment to the Federal judiciary. I think he is more than capable of assuming the responsibilities for which he has been nominated.

I thank the committee again for scheduling this hearing, and it is my privilege and pleasure to present to you the President's nominee for the Third Circuit Court of Appeals, Judge Richard Nygaard.

Senator SIMON. Thank you very much, Senator Heinz, and I note that Senator Specter has joined us. Let me call on Senator Specter at this point.

Senator SPECTER. Thank you, Mr. Chairman. I join my colleague, Senator Heinz, in thanking you for scheduling this hearing because the Court of Appeals for the Third Circuit has a very, very heavy backlog. The judges there are working very, very hard.

One of my closest personal friends, Judge Becker, is a member of that court and I can personally attest at the weight of his briefcase and his weekend hours and his evening hours, and I know that

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12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have written no legal books. I have written several articles, a few of which are appended. Also during my term as Judge, I have spoken to numerous organizations and groups from the American Legion, where I spoke on "A Day in the Life of a Colorado Cowboy", to the International Conference on Free Elections, where I addressed the conference on the necessity of a free and independent judiciary as a requisite to the guarantee of free elections (this conference was co-chaired by Secretary of State Schultz and Ambassador Jean Kirkpatrick and included delegates from thirty-five nations). I have included speeches. as requested. SEE ATTACHED EXHIBIT A.

Secondly, I enjoy research. I am now doing research for an article entitled "The Columbian Union: An Athenian Democracy for the New World". In the early 1800s, a group of anti-federalists, disenchanted with what they saw as continuing government by the aristocracy, sought to amend the Constitution. Believing that our republican form of government was a bad compromise between monarchy and democracy, they proposed an athenian-style democracy instead. I am not sure yet where the research will take me. There is very little in print about the Columbian Union.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. I exercise daily; I cross-country ski, bicycle and hike for recreation. Most recent physical exam, October, 1987.

that is a very, very burdened court and Judge Nygaard will be a very welcomed addition to that court for many reasons. First, they need him and, secondly, he is so very well qualified.

This hearing is not an easy one to schedule because of the press of business of the Judiciary Committee, so I do thank you, Senator Simon, for working it out with Senator Leahy and sitting this evening.

Senator Heinz has spoken about Judge Nygaard's qualifications and I want to associate myself with all of the remarks of my colleague, Senator Heinz. I know Judge Nygaard's wife. I met his daughter. I know people in the community in Erie who are very, very supportive of Judge Nygaard. He has a really unique reputation in his community as a man of learning, as a man of distinction, has contributed greatly to the social and professional climate of his community, and he comes with a lot of enthusiasm of the people in Erie, PA.

It is good that he has added to his academic qualifications and professional experience as a practicing lawyer his experience on the State court bench. That is a very fine prerequisite.

Finally, I would comment, Mr. Chairman, that Senator Heinz and I have made an effort to have geographical distribution. We have a Third Circuit judge from Pottsville, PA, Judge Hutchinson, and Judge Nygaard now from Erie, PA.

Sometimes, there is too much concentration in a State like Pennsylvania from the big cities and, of course, the same thing from New Jersey and Delaware, part of the circuit, but Judge Nygaard fits the bill in all the respects. So it is nice to have him here.

Thank you.

Senator SIMON. Thank you, Senator Specter.

Judge Nygaard, do you have any members of your family or friends you wish to introduce?

Judge NYGAARD. Thank you, Mr. Chairman. Unfortunately, I was not able to coordinate the family traveling with me this afternoon. They join me in spirit. I have a son who is in church camp. I have another son who is working, and a daughter who is at this point on the way to Florida and the Bahamas, and a wife who is home attending her ill mother. So I just had to come myself. They join me in spirit, however.

Thank you, Mr. Chairman.

Senator SPECTER. Mr. Chairman, I think it appropriate to note very briefly that Judge Nygaard is not accompanied by his family because of the very short notice.

Senator SIMON. Extremely short notice.

Senator SPECTER. Judge Nygaard did not get due process today in terms of the requirements of notice, but I am authorized to waive that constitutional infirmity on his behalf.

Senator SIMON. All right. Well, we appreciate your being here, and the same for Judge Munson, on very short notice, but it appeared to be the only way we could work it out here.

We thank you very much, Senator Heinz.

Senator HEINZ. Mr. Chairman, thank you.

Senator SIMON. We will be very happy to have you stay, but I think you understand the procedures here.

If I may ask both Judge Munson and Judge Nygaard to step forward and raise your right hands, do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge **MUNSON**. I do.

Judge **NYGAARD**. I do.

Senator **SIMON**. Judge Nygaard, if you can stay there, Judge Munson, we will be with you shortly.

Judge Nygaard, I note that the American Bar Association—you received a "qualified," but there were some members of the committee that voted "not qualified." Do you have any understanding why some might regard you as not qualified?

TESTIMONY OF HON. RICHARD L. NYGAARD, ERIE, PA, TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Judge **NYGAARD**. No, Mr. Chairman, I really don't have any idea why that would be so. I might speculate that I'm on the State trial bench going to the Federal appellate, but other than that, I have no idea.

Senator **SIMON**. Do you see any problems in making that shift from the State bench to the Federal bench?

Judge **NYGAARD**. No, Mr. Chairman, I don't see problems. I see a lot of work, I see a lot of preparation, I see a lot of study. I see many, many hours of reading and preparation, but I'm no stranger to that.

Senator **SIMON**. In going into your cases, in the case of *Commonwealth* vs. *Kriziak*, the Pennsylvania appellate court said of your sentence handed down, "Upon this record, we conclude that the lower court's remarks regarding its reasons for sentencing are of such brevity and conclusory quality that they do not manifest a consideration of the statutory guidelines for sentencing, nor otherwise explain the reasoning behind the sentences imposed."

Any comments? Obviously, you have read that appellate court decision before. Obviously, you will disagree with their conclusion, but have you taken these various requirements that you face seriously as you have served on the bench?

Judge **NYGAARD**. Yes, Mr. Chairman, I take them very seriously, and as an aside to that, at that same time I received this opinion, I received another one by another panel.

Up until that time, I had used approximately the same format, the same considerations, individualized to the defendant whom I was sentencing, and I received another opinion at approximately the same time that brushed right over that and said, obviously Judge Nygaard has considered all of those elements which he should consider in sentencing the defendant.

However, with that, I have made my colloquy, sentencing colloquy, far more extensive since Kriziak.

Senator **SIMON**. There was a case called *Gemelli,* if I am pronouncing it correctly.

Judge **NYGAARD**. Yes, sir.

Senator **SIMON**. The Erie City Police Chief was indicted on 28 counts of theft for improperly removing firearms from the Erie Police Department, from the evidence room there. You granted a motion to quash 27 of the 28 counts of the indictment, though you have, in general, been a strict judge, according to the notes I have received from our staff.

But the appellate court disagreed with your quashing of the indictments and pointed out that, and let me read from the appellate court, "The defendant is alleged to have illegally removed firearms from the Erie City evidence room, to have personally profited from his sale of various firearms so removed, and to have attempted to cover up the removal and sale of firearms after he became aware of the investigation into the disappearance of the firearms."

And then the court makes this conclusion: "We perceive absolutely no basis for dismissing such serious allegations as merely de minimis infractions." Why did you regard them as de minimis infractions?

Judge **Nygaard**. The primary thrust of my rationale for quashing that indictment, that information, was that in Pennsylvania we have a rule that if a person commits an offense which is chargeable under a specific provision of the crimes code, and a general, he should be tried under the specific.

And the usual example I give is if somebody forges a prescription, they should be charged under the forged prescription law and not the general forgery law. And since the ownership of those items—there were approximately 1,100 items which were missing—was with the State, it comes under the escheat law. I brought that up to the attorneys well in advance of the trial and told them, "you better consider who owns this property because an element of theft is that it is 'property of another'."

And if it is property of the State of Pennsylvania, the Commonwealth, then he should be charged under the escheat law, and that was the primary thrust of it. The de minimis was—there were several other reasons that I put in to, shall we say, get definition from the court.

The de minimis only comes about as a result of the fact that the State themselves had—if any of these items were turned over to them, they would be destroyed and would be of no value.

In order for a theft to be a theft, it must be an "item of value," and so those were the reasons for the de minimis. But the primary thrust was the escheat, and they reversed that on an unfortunate—unfortunately, the attorney had filed his motion to quash the indictment with me and had not filed it with the clerk of records.

And, consequently, when it was sent over to the clerk of records, the motion itself was docketed one docket entry after my opinion, which makes it look like my order was *sua sponte,* and that was, as I gather, the primary thrust of their reversal.

Senator **Simon**. Finally, let me note one of the things in your record that I applaud. I think one of the things that a judge ought to do is to be sensitive to those less fortunate, and I have noted your work for the mentally retarded.

I can't tell you precisely how that is going to make you a better judge, or has made you a better judge, but I believe that it has in ways you can't gauge and I can't gauge.

Judge **Nygaard**. Thank you.

Senator **Simon**. You are aware of the American Bar Association requirement in the Code of Ethics that you not belong to groups that discriminate. Have you examined your memberships, and do you feel that there is any membership that presents any compromise in this regard?

Judge NYGAARD. No, Mr. Chairman. As a matter of fact, I would say that I'm in an ongoing examination of any associations and if I felt that any one interfered with my ability to be a fair judge or gave the appearance of impropriety, I would withdraw.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you very much.

Judge Nygaard, I congratulate you upon your appointment by the President, and also congratulate you upon having the support of both of your Senators, one of which is a member of this committee, and I assure you the fact that he is a member of this committee won't hurt you at all.

One of the characteristics of judicial activism is said to include a tendency by the judiciary toward problem solution rather than grievance resolution. Would you give the committee your views on this criticism?

Judge NYGAARD. I'm sorry. Would you repeat that last——

Senator THURMOND. One of the characteristics of judicial activism is said to include a tendency by the judiciary toward problem solution rather than grievance resolution.

Judge NYGAARD. Yes, Senator Thurmond. The primary thrust of my desire as a judge is to do justice in each case and each person and the parties that are before me. And while I suppose any decision tells a story to others, I don't tell a story to others at the expense of those who are before me for resolution of their dispute, for a trial of their problem.

Senator THURMOND. The phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

For instance, some Federal judges have taken over various institutions of the States. They have taken over school districts, prisons, hospitals, and other things. What does the phrase "judicial activism" mean to you?

Judge NYGAARD. When one ventures beyond the issue before them into a personal or moral or political agenda which they have to advance that agenda and becomes active from the bench in proposing and pushing and advancing their own agenda, shall we say, then one fails to do justice with they who are before you.

And if one becomes active, shall we say, in that sense—ventures into the field of legislation, decides to make law while these people are before you—that is what I consider to be a transgression of the essence of the judicial function, it being reason.

Senator THURMOND. Do you think you can confine your powers to interpreting the law——

Judge NYGAARD. Absolutely, yes, Mr.——

Senator THURMOND [continuing]. Rather than making the law?

Judge NYGAARD. Yes, sir. That is what I view as the job of the——

Senator THURMOND. Some judges on the bench have tried to make the law. That is our job; that is the Congress' job.

Judge NYGAARD. I wholeheartedly agree with you. I have a strong belief in the separation of powers, that we should not venture into those areas exclusively and constitutionally reserved for the executive and the legislative branches of government.

Senator **Thurmond**. Under the Constitution, we not only have three branches of government which are a check and a balance on each other, we have a division of power, as well as a separation, as I mentioned.

The division of power is between the Federal Government and the States. The Federal Government was established as a government of limited power, but they are going into too many fields of activity.

Now, they can do that if they want to amend the Constitution, but as long as we have this Constitution, unamended as it is to any great extent, it seems to me we ought to abide by the Constitution.

And these people who want to reform and plunge the government into every facet of people's lives and overriding the States on matters—if they feel that way, they ought to amend the Constitution. The members of Congress ought to do that rather than to go into fields where they don't have authority.

In other words, I just believe in abiding by the Constitution. How do you feel?

Judge **Nygaard**. I wholeheartedly agree with you, Senator Thurmond.

Senator **Thurmond**. I don't think I have any other questions. I hope you will be confirmed. We have a good Chairman here tonight and I think he will get you out right away.

Senator **Simon**. Thank you very much, Senator, and we thank you, Judge. Let me add that some of my colleagues may have written questions. We have one more important member of this committee who is here—and let me hasten to add, the reason for your being here tonight is because Senator Specter pushed, and pushed hard, to have you moved up here, and let me call upon Senator Specter.

Senator **Specter**. Thank you, Mr. Chairman.

I have a line of questions which Senator Thurmond usually asks, but since he has not, I shall, and that is do you promise to be courteous if you are confirmed to be a Federal judge?

Judge **Nygaard**. Absolutely, Senator.

Senator **Specter**. That may seem like a rather innocuous and easy question, but what Senator Thurmond then follows up with is an admonition that the more power a person has, the more courteous he must be, and the more concerned he must be with the way he comports himself or herself and treats the people who come before him on the bench.

As a Federal judge, you have enormous power, especially as a court of appeals judge, and you have already had experience as a jurist, but one of the items which I have heard Senator Thurmond emphasize repeatedly that I think is very, very important at this stage—he gives this speech better than I do, much better, but you want to think about the Judiciary Committee and Senator Thurmond and the questioning when you have people before you to be very courteous.

In elective office, I think we have a very substantial leavening quality because we have to go before the electorate. When you have a lifetime appointment, subject only to good behavior and the constitutional power of impeachment, there may be a tendency to become somewhat more authoritarian.

So I make those brief statements with the request that you bear Senator Thurmond's admonition in mind, even though it is only his agent who articulated it this evening.

Judge **Nygaard**. Thank you, and I accept the admonition.

Senator **Specter**. Is that okay, Senator Thurmond?

Senator **Thurmond**. That is fine. You are learning fast. [Laughter.]

Senator **Simon**. We thank you very much. If I can add a personal note, I went to Dana College in Blair, NE, and there were a lot of Nygaards there. I don't know if there were any related to you or not, but it was a good Scandinavian school and I assume somewhere there may be some relationship to those Nygaards.

Judge **Nygaard**. There are a few of us around, but mainly up in that part of the United States, Mr. Chairman.

Senator **Simon**. We thank you very, very much, Judge Nygaard, and, as I indicated, there may be some questions submitted to you in writing. We would ask that you respond as rapidly as possible so that we can proceed on a decision.

Judge **Nygaard**. Thank you, Mr. Chairman, and I just want to give you my personal and final thanks, so to speak, for fitting me into your very tight schedule. I know that there was a great deal of effort on your part, also, to accommodate this late scheduling at the supper hour, and I appreciate it very much.

Senator **Simon**. Thank you very much.

Judge Munson, if you can take that hot seat there?

TESTIMONY OF HON. ALEX R. MUNSON, SAIPAN, NORTHERN MARIANA ISLAND, TO BE JUDGE OF THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS

Judge **Munson**. Okay. Thank you, Mr. Chairman. If I may, I am very honored and privileged to be here, I am not very familiar with your schedule, but I strongly suspect it is very rare to have hearings at this hour. I am greatly appreciative of you working me in because of my schedule, and I thank you and the rest of the committee members.

Senator **Simon**. We are very pleased to be able to do this.

You are in an unusual jurisdiction in the Mariana Islands. Among other things, you have to make decisions that involve local customs that are somewhat different, and local disputes.

What have you done to sensitize yourself to those local customs that you may have to make some judgments on?

Judge **Munson**. Well, I try to learn as much as I can about the cultures that are in Micronesia. There are four separate political entities, and I have tried to study the history, the culture, the art, the background; I have talked to the older people to see what the traditional customs have been, and saturate myself with whatever knowledge is available as to all aspects of the society.

Senator **Simon**. Let me ask you this question. I don't know the answer for this. Inevitably, in a jurisdiction with a relatively small population, you are going to know many people who will come before your court.

What happens if you feel it necessary to recuse yourself from a trial that is up? What is the procedure, then?

Judge MUNSON. There is another district court in Guam, which is 100 miles south of Saipan. If I was—if I had to be the judge in a case of a very close friend, I would obviously have to recuse myself and that judge from Guam would come over. That happens very often both ways. The judge in Guam sits on Saipan, and vice versa.

Senator SIMON. In a case called the *Manglona* case, there has been a complaint that you did nothing on it for 2 years and then simply handed it back to the courts when you were nominated for this position.

Any comments on your part?

Judge MUNSON. Yes, Mr. Chairman. I'm aware of that criticism. There were two separate issues. There was an issue in equity for a temporary restraining order to stop voting violations. There was a second cause of action in law for a 1983 civil rights violation act.

After the equity portion was solved, I had at least five chamber conferences with the attorneys involved. At each chamber conference, we got closer and closer together to a settlement and the case was set for trial on two different occasions.

But because settlement was getting close, I did not proceed to trial, and the reason is that in such a small community feelings of antagonism last for a long time if the court makes the decision.

If people can reach a settlement in court, which is much closer associated with the traditional way of settling matters in the islands—that is, by settlement—hard feelings don't last as long. So any time a dispute can be resolved short of trial, I'll stand on my head to get that done.

As I said, every time we met for a settlement conference, we got closer and closer to a settlement. When I was appointed, or nominated for this position, because I thought that possibly I might have to be on the appellate panel, I returned it to the commonwealth court.

I figured because I had never ruled on the question of law that if the counsel stipulated that I could hear it on appeal that that may well be a lot easier for the district court and the commonwealth court because according to the covenant, we have to have two Federal judges and one commonwealth judge.

If I recuse myself, that means that the next closest judge is in Hawaii, besides the one from Guam—that is 4,000 miles away—and, more probably, San Francisco, 6,000 miles away. And in the interests of judicial economy, I made that decision to do what I did.

Senator SIMON. One of the other charges that has been made is that you have not been careful in the handling of expenditures that are under your jurisdiction. You are undoubtedly aware of the charge. What is your response to that?

Judge MUNSON. I think it is totally unfounded. I have never exceeded my budget. I have never used court funds for anything other than what have been authorized by law, or by what the Secretary of the Department of Interior for Territorial and International Affairs has told me to expend money on. That is my immediate supervisor.

Senator SIMON. Has there ever been any official inquiry of any kind, any probing of any kind like that, other than this charge that has been given to our committee?

Judge MUNSON. Absolutely not, Mr. Chairman, and I, for the life of me, cannot understand why the charge was made.

Senator SIMON. You heard my question to Judge Nygaard. The American Bar Association Code of Ethics requires that you not belong to organizations that discriminate. You have reviewed the groups you belong to. Is there any affiliation that would present any problems that way?

Judge MUNSON. No, Mr. Chairman. I don't belong to any groups that practice any kind of discrimination openly or any other way. I never have.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you very much, Mr. Chairman.

Do you go by the title of "Judge" now in the position you hold?

Judge MUNSON. Yes. I'm the Chief Justice of the High Court, which is the supreme court for the trust territory.

Senator THURMOND. Let us see. I believe they call you Chief Justice, don't they, of the commonwealth?

Judge MUNSON. Yes, Mr. Senator, of the trust territory. The commonwealth is a political entity within the trust.

Senator SIMON. Do you want to pull that microphone just a little closer to you there? Okay.

Senator THURMOND. Judge, I just want to be sure and address you by the right title. Judge Munson, I congratulate you upon your appointment, and I want to express my appreciation to Representative Tenorio for coming over and testifying in your behalf.

You don't have any Senators, so I guess the distinguished Senator from Illinois and I will have to be your Senators.

Judge MUNSON. Well, I'd be delighted.

Senator THURMOND. But you have got a representative here who is an able man, and he comes in and endorses you highly and that means a lot to us.

I understand you have made a good record. I wonder if your wife feels very comfortable talking to you. I notice you have been to seven different colleges. Sometimes when I get around people who are so highly educated, I wonder whether I am going to make a mistake talking with them.

You have got four degrees, haven't you?

Judge MUNSON. I'm sorry?

Senator THURMOND. A BA degree from Long Beach State College, an MA degree from Long Beach State College, doctor of education degree from the University of Southern California, and a JD degree from Loyola University, is that correct?

Judge MUNSON. Yes, sir.

Senator THURMOND. Well, you have got enough education and you have had the experience, it seems to me, to make a good judge. I want to ask you this. I consider judicial temperament to be a prerequisite for a Federal judge. I have seen some lawyers in the courtroom embarrassed by judges yelling at them. I have seen judges holler out at jurors and people in the courtroom, and it is inexcusable.

A Federal judge has all the power in the world that anybody could ever ask for. Do you think you could conduct yourself in a way to control your temper and show power in the proper manner towards the people with whom you come in contact?

Judge MUNSON. Mr. Senator, I think I have a reputation for exactly what you are talking about. When I was practicing law as a young lawyer, I was embarrassed and shouted at by judges, and I swore that if I was ever on the other side of the bench, I would never embarrass any litigant or counsel, and I never have and I wouldn't. I am very sensitive to——

Senator THURMOND. You have to speak out. I can't hear you. Speak a little louder into your microphone.

Judge MUNSON. I said as a young lawyer, I was embarrassed by judges that were a little over-zealous, and they impressed upon me what a bad habit that is. I would never subject any litigant or counsel to that kind of treatment. I think that everybody deserves to be treated equally and politely.

Senator THURMOND. Now, you may have a conflict come before you that your own conscience and sense of justice feels one way and yet stare decisis—a case has been decided holding another way. So what would you do?

Judge MUNSON. I would have taken an oath of office to follow the law and I'd have to follow the law. My personal feelings and conscience would be a breach of my duty if I did not follow the appellate court or stare decisis.

Senator THURMOND. Then an appellate court, circuit court, or the Supreme Court could act otherwise, but as long as you are a district judge, that is a trial court and I presume your theory would be to follow stare decisis?

Judge MUNSON. Absolutely.

Senator THURMOND. I don't think I have any other questions. I wish you well on the bench.

Judge MUNSON. Thank you, Senator Thurmond.

Senator THURMOND. I am glad to see you and glad to see your wife here, and pleased to have your representative appear here today.

Senator SIMON. Thank you very, very much.

Our hearing stands adjourned.

Judge MUNSON. Thank you.

[Whereupon, at 7:25 p.m., the committee was adjourned.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name(include any former names used.)

   Richard Lowell Nygaard.

2. Address: List current place of residence and office.

   Residence-59 Gibson Street, North East, PA 16428
   Office-Judge's Chambers, Erie County Court House,
   Erie, PA 16501

3. Date and place of birth:

   July 9, 1940, Thief River Falls, Minnesota.

4. Marital Status: List maiden name of wife (or husband's name). List spouse's occupation, employer's name and business address.

   Married to Martha Jean (Marks) Nygaard, housewife.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   University of Michigan Law School - Juris Doctorate, August, 1969 - December, 1971.

   University of Southern California - Bachelor of Science, Cum Laude, in Public Administration, September, 1964 - June, 1969.

   East Los Angeles College - No degree, 1964-1965.

   University of California (correspondence course) no degree, 1964-1965.

   Antelope Valley College- No degree, 1963-1964.

I attended colleges C,D and E above to correct deficiencies in my high school records so that I could be admitted to the University of Southern California. During the time I went to high school, I was a very poor student and permitted to graduate only because the principal thought I would not be going to college. When I returned from the U.S. Navy, I decided I would go to college, hence it was necessary to attend several Junior Colleges to correct these deficiencies.

6. Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

December, 1971-March, 1981. Partner in Orton, Nygaard and Dunlavey, 33 East Main Street, North East, PA 16428.

May, 1981-present, Judge of the Court of Common Pleas of Pennsylvania, Sixth Judicial District, Erie, Pennsylvania.

1984-1985-Pennsylvania State University, Behrend Campus. Lecturer, "American Legal Systems" and "Constitutional Law".

Because of the wide range of my previous occupations and because I believe my work experience made a significant contribution to my abilities as a jurist, I have also included the following occupational history, dating back to when I first began work at the age of 11.

I came from a poor family and was encouraged to begin work early, first shovelling snow in the winter and selling papers in the summer. At the age of 11, I began my first job that involved working for another person--shining shoes in a barber shop, where I also swept floors, etc. This was one of my most significant jobs. It was in the barber shop that I learned how to please others; how to discuss issues and events, and what it's like to hustle a buck.

I worked in the barber shop for two years. From there I went to work on a paper route, in a chicken hatchery, a ceramic studio, a soda shop and various other restaurants. In my junior year of high school I began working nights loading chickens and turkeys and summers on various poultry ranches around Antelope Valley, California, where I performed my most unusual job--putting saddles on turkeys (yes, putting saddles on turkeys). I continued this until I graduated from high school, after which I went to work for Standard Stations, Inc. as a salesman. I worked for Standard until I went on active duty in the U.S. Navy. After I was discharged, I held various jobs while I attended Junior College- salesman, bus driver, carpenter, truck driver, until I was hired by the Los Angeles County Fire Department where I worked full time until I graduated from the University of Southern California. I worked my way through Law School as a librarian; process server and a law clerk for an Ann Arbor, Michigan Law Firm, where I worked until graduation.

7. Military Service: Have you had any military service? Give particulars.

Yes. United States Naval Reserve, March 12, 1958-March 11, 1964. Active duty from February 10, 1959, through January 21, 1961, Personnel Man Second Class. Serial Number 4843126. Honorably discharged on March 11, 1964.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the committee.

1969- Graduated Cum Laude from University of Southern California.

1969- Recipient of the University of Southern California Faculty Letter of Merit Award for "interest and promise of leadership in the field of Public Administration, and significant service to the School of Public Administration and the University of Southern California".

1970- University of Michigan- received the American Jurisprudence Award for Excellence in the Field of Torts.

1982- Mayor's Certificate of Merit for Community Betterment Through Outstanding Judicial Performance.

1982- Appointed by President Reagan to be a delegate to the 35 nation International Conference on Free Elections sponsored jointly by the U.S. State Department and the American Enterprise Institute. I was the only U.S. Judge to serve as a delegate.

1982- Recipient of the Mayor Louis Tullio Celebrated Citizen Proclamation-Judge Nygaard day in Erie.

1982- Community Service Award in the area of individual and human rights presented by the Seventh Day Adventist Church.

1983- Erie County Grange Community Service Award of the Year for the Elected Official who made the greatest public service contribution.

1984-Multiple Sclerosis Society Award for Community Service.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you have been a member and give the titles and dates of any offices which you have held in such groups.

Erie County Bar Association
Pennsylvania Bar Association
American Bar Association
Pennsylvania Conference of State Trial Judges
National College of Probate Judges
American Judges Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies.

The only organizations to which I belong which is involved in lobbying before public bodies in the National Association for the Advancement of Colored People. I am a life member.

Please list all other organizations to which you belong:

Erie Council for Exceptional Children
Erie Association for Retarded Citizens
Pennsylvania Farmers Association
Scotch Highland Breeders Association (beef cattle)
Sons of Norway
F & A Masons, Ann Arbor Michigan
Order of the Eastern Star, North East, Pennsylvania
Ducks Unlimited
Boy Scouts of America, French Creek Council
Trout Unlimited
Cursillo Movement, Diocese of Erie
American Legion Post Number #105, North East, PA
Presbyterian Church
Edinboro University of Pennsylvania Board of Advisors
United States Supreme Court Historical Society
The Shrine Club
The Erie Club

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Court of Common Pleas, April, 1972.
Pennsylvania Supreme Court, October, 1972.
United States District Court for the Western District of Pennsylvania, October, 1972.
United States Supreme Court, June, 1977.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In December, 1980, I was appointed Judge of the Pennsylvania Court of Common Pleas by Governor Thornburgh. This appointment was confirmed in May of 1981. I served pursuant to that appointment until 1983 when I was elected. In the spring primaries of 1983, I received the nomination of both Democrat and Republican parties. I was sworn in as an elected Judge in January of 1984. The Court of Common Pleas is the Court of general jurisdiction in Pennsylvania.

15. Citations: If you are or have been a Judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

I have appended ten of my Opinions, marked as Exhibit B.

As Exhibit C I have created a short summary of and citations for all appellate Opinions I can locate where my decisions were reversed. There are instances where the reviewing Court has corrected sentences or simply remanded a case for correction of a sentence, (i.e. I sentenced a man to one and one-half to three years without possibility of parole. This was corrected to a three to six year sentence with possibility of parole). These have not been included. I can find no instance where my judgment was affirmed with significant criticism of my substantive or procedural rulings.

I have appended as Exhibit D Opinions which I have written on Constitutional issues and citations to Appellate Court rulings thereon.

16. Public Office: State chronologically any public offices you have held other than judicial offices, including terms of service and whether appointed or elected. State any unsuccessful candidacies for elective public office.

In 1977 I was a candidate for and elected as as a County Councilman for Erie County from the Sixth Councilmanic District, in which capacity I served until being appointed to my position as Judge.

I have not run unsuccessfully for any public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

December, 1971-March, 1981. Partner in Orton, Nygaard and Dunlavey, 33 East Main Street, North East, PA 16428. May, 1981-present, Judge of the Court of Common Pleas of Pennsylvania, Sixth Judicial District, Erie, Pennsylvania.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

During the time I was in the practice of law, I was a general practitioner. It included only minor matters of litigation, domestic relations, counseling, estate planning and probate.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Typical clients included families, small businesses and corporations around the North East, Pennsylvania area. From 1976 until the time I ascended the Bench, I also represented the Dr. Gertrude A. Barber Center, Inc., the Erie Council for Exceptional Children and the Erie Association for Retarded Citizens. In that capacity I developed somewhat of a specialty in law and the mentally retarded.

I was also a trustee in bankruptcy and when the new bankruptcy code was enacted, I was appointed as one of five trustees in Erie County. Consequently I developed somewhat of a sub-specialty in bankruptcy law as well.

Finally, I represented two Second Class Townships (North East and Wayne) and developed some expertise in Municipal Law and especially Zoning. I wrote a "model" Agricultural Zoning Code.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in Court only infrequently. When I first started practice in 1972, I defended several indigent persons on criminal charges based upon Court appointments. I had relatively few Court appearances thereafter until I became a bankruptcy trustee. In the years 1979 and 1980, I appeared in Court more frequently as Attorney for bankrupt clients and as a trustee in bankruptcy. I also appeared occasionally on behalf of clients at District Magistrate Court.

2. What percentage of these appearances were in federal courts, state courts of record, other courts.

Federal Courts-40%
State Courts of record-30%
Other Courts-30%

3. What percentage of your litigation was civil; criminal.

Civil litigation-100% (with the exception that in 1972 I accepted several Court appointments to represent indigent defendants).

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I do not recall the number of cases which I tried to verdict or judgment. As an Attorney there would only be a few, as a Judge, I have presided over hundreds. During the time I was in the practice of law, I was a general practitioner. It included only minor matters of litigation, domestic relations, counseling, estate planning and probate. Since becoming a Judge, I have tried civil, criminal, jury and non-jury cases almost on a daily basis.

5. What percentage of these trials were jury; non-jury.

(a) I can only recall two cases which I tried, as an Attorney, to verdict before a jury. The balance were all tried before a Judge, Administrative Law Judge or Bankruptcy Referee.

As Judge, trials are about evenly divided between jury and non-jury. I try approximately 40 jury trials a year; oral arguments, and equity or bench trials by the hundreds..

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented, describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case dates of representation, names of the courts and judges they came before and the names, addresses and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Because of the nature of my practice (see question 17), it is hard to find any ten cases which I would consider to be significant. However, following is a sampling of my litigation.

IN RE: SUNNYSIDE HOME FOR GIRLS, 26 Fid. Repr. 423 (1976). I represented the Erie Council for Exceptional Children, Inc.. It was seeking by the Doctrine of Cy Pres to be the distributee of certain property owned by the Sunnyside Home for Girls. The E.C.E.C.I. had leased the property from Sunnyside for years. Sunnyside was a nearly defunct corporation whose only asset was the real estate. They wished to give it to E.C.E.C.I.. However, because the purposes of the two corporations were somewhat different, the prayer was denied. The case was tried before the Honorable James Dwyer, Erie County Orphans' Court, Erie, Pennsylvania on May 6, 1976. Sunnyside Home for Girls was represented by Donald C. Buseck, Esquire, 1400 G. Daniel Baldwin Building, Erie, Pennsylvania 16501 (814)454-3821. Gannondale Home for Girls was represented by Michael L. Carr, Esquire, 5620 Peach Street, Erie, Pennsylvania 16509 (814)868-0930.

SELKREGG V. RIDG-U-RAK, INC (settled unreported). I represented Ridg-U-Rak, Inc. and defended it in a Declaratory Judgment action and an action on an employment contract. Selkregg, a terminated employee, was claiming certain severance rights, and retirement benefits under ERISA. The case was ultimately settled. Mr. Selkregg was represented by Attorney Harry Martin, 150 E. 8th Street, Erie, Pennsylvania 16501 (814)456-4000.

BETTY PRESTON V. YELLOW CAB COMPANY (settled unreported).
I represented Betty Preston in an action against Yellow Cab Company for injuries which she sustained as a passenger in a Yellow Cab which was involved in a traffic accident. This pre-dated our "no fault" law in Pennsylvania. No significant issues were presented in this case. Yellow Cab Company was represented by John Wolford, Esquire, 600 First National Bank Building, Erie, Pennsylvania 16501 (814)453-7611.

COMMONWEALTH V. KUTRUFF. I successfully defended Henry Thomas Kutruff on a charge of Arson for the burning of a home in an outlying township. The case presented no significant issues of law. However it provides an example of my courtroom skills and professional demeanor in a jury trial. The District Attorney was Alois Lubiejewski, Esquire, 402 West Sixth Street, Erie, Pennsylvania 16507 (814)452-4451.

COMMONWEALTH V. MARTINSON. I was unsuccessful in the defense of Mr. Martinson on a charge of Aggravated Assault which arose out of a bar fight, in which he was eminently successful. Once again, no significant issues of law were presented. It was a jury trial. The District Attorney was Daniel Kuhn, 72 N. Main St., Union City, Pennsylvania 16438 (814)438-7671.

IN RE: MEADVILLE CITY HOSPITAL. I was the "fair Hearing Examiner", appointed pursuant to federal regulations found at 42 C.F.R. §100.106 (1978). Meadville City Hospital had requested a hearing in accordance with the provisions of Section 1122 of the Social Security Act, claiming a lack of substantial evidence to support the Department of Public Assistance findings and recommendation that Meadville City Hospital had not demonstrated the need for a project to be federally funded. The decision ultimately turned on a very interesting point of law. The hospital feeling it had been denied due process had requested a fair hearing. In order to prepare for the hearing they requested and as Hearing Examiner I ordered, the depositions of a number of people including Dr. Gordon K. McLeod, Secretary of the Pennsylvania Department of Health. The Department of Health refused to submit Dr. McLeod for deposition, claiming instead "executive privilege". The Department was unable to substantiate its claim of executive privilege on behalf of the Secretary. Accordingly, I ordered his deposition. When he refused to submit himself for deposition, the hospital claimed that it was being denied the fair hearing to which it was entitled under the Social Security Act. I quite agreed. Thereafter, the hospital submitted a "Motion for Decision Reversing the Designated Planning Agencies Recommendations to the Secretary of Health, Education and Welfare Regarding Meadville City Hospital's Proposed Capital Expenditure". The result sought by the hospital with its motion was one without precedent in a Section 1122 proceeding and requested the equivalent of a Summary Judgment in an amount which (by my recollection) was close to four million dollars. The Department was unable to give me any compelling reason (1)why they should not submit the Secretary for deposition (2)if they did not, why I should not grant judgment for the hospital. Consequently on December 2, 1979, I reversed the recommendations of the Designated Planning Agency for the capital expenditure proposed at the Meadville City Hospital and declared them to be in conformity with the standards, criteria and plans described in 42 C.F.R. §100.104 (a)(2). Meadville City Hospital was represented by Clara Mattern, Esquire, 4614 Fifth Ave., Pittsburgh, PA 15213 (412)687-7677 and Linda Haddad Hogue, Esquire, of the same address and telephone number and Barbara A. Blackmond, Esquire of the same address and telephone number. The Commonwealth of Pennsylvania Department of Health was represented by the Attorneys General, D. Galton Cabot Moss, Esquire, P.O. Box 90, Harrisburg, PA 17120 (717)783-2500, Attorney Reed Hamilton of the same address and telephone number, Attorney Carolyn B. McClain of the same address and telephone number.

However, after my intense participation in the system as Trial Judge, I cannot point to any of the cases which I participated in as an Attorney and call them significant or which allowed me the opportunity to distinguish myself as a trial counsel. The grist of my daily practice was counsel for the family problems and the problems of the small business. I was a farmer myself, and represented a large number of the farmers in the east county area.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

In addition to the above, as Judge I have presided over hundreds of cases which have been tried to verdict or judgment. I could not begin to state the number of cases that I have heard in the seven years that I have been a Judge. I heard the first capital case tried in Erie County in 30 years; a bitter, divisive school strike; civil cases from boundary disputes to million dollar verdicts; from class action suits to the pro per aggrieved.

Another legal activity which has had a significant impact on my abilities as a Judge is teaching law. I have lectured on "American Legal Systems" and "Constitutional Law" at the Pennsylvania State University, Behrend Campus.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

I analyze all cases preliminarily to determine whether I

(a) Know any of the parties;
(b) Have a close personal relationship with any Attorneys on the case; and
(c) Whether I might conceivably have any interest, direct or otherwise, in the outcome of the case.

In the event I find (a), I reveal the same to the Attorneys and parties and if any objections are made, hear the objections to determine whether or not there will be the appearance of an impropriety. In the event I find (b) I reveal the same to the Attorneys and parties and if any objections are made, hear the objections to determine whether or not there will be the appearance of any impropriety. In the event I would ever find (c) I would recuse myself from the case. That has never happened.

I only recall having recused myself once in a situation which involved matters filed against a corporation which I had represented as an Attorney. The trial came within a year and a half after my appointment to the bench.

I can identify no categories of litigation or financial arrangements that are likely to present any potential conflicts of interest during my service on the Federal bench. Indeed, it is my intention to analyze every organization, and investment to determine whether it might potentially give the appearance of impropriety. If I find that it will or may, I will withdraw or sell my interest, whichever the case may be.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No, except that I have been admitted to the Master in Judicial Studies program at the National Judicial College. I have just begun my studies there. Also, at the time this federal opportunity was presented, I was in the process of establishing a schedule whereby I could obtain my Ph.D. in philosophy. (It is my intention to pursue my Ph.D. if appointed to the Federal Court, or, continue my Masters program if I remain on the State Bench).

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report required by the Ethics in Government Act of 1978, may be substituted here).

1987-

Commonwealth of Pennsylvania	Judicial Salary	$ 68,992.00
Nygaard Family Partnership	Distribution	$ 2,116.00
Prudential Bache	Dividend Income	$ 243.00
Philadelphia Electric	Dividend Income	$ 25.00
Union Electric	Dividend Income	$ 14.00
Baltimore Gas	Dividend Income	$ 221.00
Central and SW Corp.	Dividend Income	$ 197.00
Central Maine Power & Light	Dividend Income	$ 77.00
Centerior Energy	Dividend Income	$ 185.00
Minnesota Power	Dividend Income	$ 135.00
Fireman & Agricultural C.U.	Interest Income	$ 7.00
First National Bank	Interest Income	$ 297.00
National Bank of North East	Interest Income	$ 300.00
Venango Land and Farming	Interest Income	$ 254.00
Venango Land and Farming, Inc.	Interest Income	$ 1,993.00
Sixth Street Complex	Interest Income	$ 183.00
Venango Mgmt. Services, Inc.	Interest Income	$ 687.00
Baltimore Gas and Electric	Gain on stock sale	$ 1,637.00
Centerior Energy	Gain on stock sale	$ 534.00
Robert Hicks	Int. on sale of r.e.-art. of agt.	$ 782.00

Central and SW Corp.	Gain on stock sale	$ 780.00
Central Maine Power	Gain on stock sale	$ 812.00
Minnesota Power	Gain on stock sale	$ 810.00
Union Electric	Gain on stock sale	$ 1,482.00
Philadelphia Electric	Gain on stock sale	$ 606.00
Gas Well at Farm	Royalty	$ 109.00
Venango Mgt. Services, Inc.	Distribution from Sub-Chapter S. Corp.	$ 316.00
Vineyard Oil and Gas Co.-1979-I	Ltd. part. dist.	$ 704.00
Vineyard Oil and Gas-1980-IV	Ltd. part. dist.	$ 336.00
Vineyard Oil and Gas-1981-II	Ltd. part. dist.	$ 28.00
Vineyard Oil and Gas-1981-III	Ltd. part. dist.	$ 4.00
Vineyard Oil and Gas-1982-III	Ltd. part. dist.	$ 123.00
Vineyard Oil and Gas-1982-IVB	Ltd. part. dist.	$ 287.00
Sixth Street Complex	Ltd. part. dist.	$ 163.00

1988-

Commonwealth of Pennsylvania	Judicial Salary	$ 7,681.00
Nygaard Family Partnership	Distribution	$ 1,000.00
Venango Land and Farming, Inc.	Interest	$ 750.00
Minnesota Power and Light	Dividend Income	$ 8.00
Robert Hicks	Int. on sale of r.e.-art. of agt.	$ 280.00
Vineyard Oil and Gas	Ltd. part. dist.	$ 506.00
Sixth Street Complex	Ltd. part. dist.	$ -0-

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

SEE FINANCIAL NET WORTH STATEMENT WITH SCHEDULES ATTACHED

EXHIBIT B

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	6	228	00
U.S. Government securities—add schedule			
Listed securities—add schedule A		529	00
Unlisted securities—add schedule B	310	375	00
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule C	110	500	00
Real estate mortgages receivable			
Autos and other personal property	15	000	00
Cash value—life insurance		500	00
Other assets—itemize:			
D	168	712	00
Total assets	611	844	00

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured			
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule	17,	232	00
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	17,	232.	00
Net worth	594,	612.	00
Total liabilities and net worth	$611,	844.	00

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor *	60	000	00
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.) No			
Are you defendant in any suits or legal actions? No			
Have you ever taken bankruptcy? No			

*Venango Land and Farming: The Banks require that all three shareholders also sign the notes for the corporation's line-of-credit.

SCHEDULE A- LISTED SECURITIES

23 shares common stock in Minnesota Power and Light (sold-1988)	$ 529.00
TOTAL-	$ 529.00

SCHEDULE B- UNLISTED SECURITIES

100 shares of Venango Land and Farming-	$310,000.00
375 shares of Vineyard Oil and Gas-	$ 375.00
TOTAL-	$310,375.00

SCHEDULE C- REAL ESTATE OWNED

Residence- 59 Gibson Street, North East, PA-	$107,000.00
Lot- Mina, New York-	$ 3,500.00
TOTAL-	$110,500.00

SCHEDULE D- OTHER ASSETS

Vineyard Oil and Gas Company, Inc.- limited partnership	$100,000.00
Registered Scotch Highland Beef Cattle-	$ 1,800.00
Sixth Street Complex, Limited Partnership-	$ 7,500.00
Robert Hicks, balance due on articles of agreement for sale of real estate-	$ 6,412.00
Venango Land and Farming, balance due on notes-	$ 53,000.00
TOTAL-	$168,712.00

6. Have you ever held a position or played a role in a political campaign?

No.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged". Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have been a member of several organizations which serve the mentally retarded. These include the Dr. Gertrude A. Barber Center, the Erie Council for Exceptional Children, and the Erie Association for Retarded Citizens. Before becoming a Judge, I represented all three as their solicitor and participated in other fund raising activities on their behalf. Since becoming a Judge, the Pennsylvania State Code of Professional Responsibility forbids my participation in any fund raising activities, even on behalf of charities. I participated with these organizations from 1976-1981 when I became a Judge.

However, my sensitivity to the needs of the mentally retarded comes not so much from my activities as an Attorney or the Canons of the American Bar Association. One of my close companions as a child was my uncle. He is mentally retarded. Although an adult, he grew up with us as a friend. Very early I became sensitized to the problems of the mentally retarded and the difficulties they face being thus stigmatized. I recall on a number of occasions coming to his defense from verbal taunting and the type of cruelty to which our mentally retarded were subjected during the forties and fifties. I have never forgotten that.

I am also a life member of the NAACP. Once again, my participation in that organization has little to do with my profession. I was sensitized to the needs of blacks, American and world-wide, by my aunt, who was a missionary and teacher in Liberia for forty years (1919-1959). Her visits to our house, her teachings, and our conversations when I was a child, made me particularly sensitive to race relations. I was raised as a part of a Norwegian culture which stressed accountability for both individual achievement and caring for those less advantaged. Thus, in my formative childhood years, the concerns of blacks were part of our household conversation, and, we were taught to care.

In 1983, when I was invited by President Dwayne Brock to join the NAACP as a life ~~member,~~ I did so. As an affirmative act on my part, I was the first Judge to employ a black law clerk in Erie County, who may well be its first black Judge.

In 1980, my wife and I served as the co-chairpersons of the 1980-81 Cerebral Palsy telethon. This was a fund raising activity, we stayed up, and stayed on television for the twenty-four hours of the National Cerebral Palsy Telethon.

In 1982, my wife and I were the celebrity co-chairpersons of the Erie County March of Dimes.

In 1981 I hired a secretary who had Multiple Sclerosis. Later we formed the N.W. Pennsylvania Chapter of the National Multiple Sclerosis Society, where I served one year as Vice-President.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that indiviously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies?

No. I am a member of the Freemasons and a member of the Order of the Eastern Star. Freemasons is male and Eastern Star is female. My reasons for membership are primarily charitable. Masonic bodies nationwide contribute approximately one and one-half million dollars daily to a variety of charities.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

Yes.

If so, did it recommend your nomination?

Yes.

Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

In 1985, there existed three vacancies for the United States District Court for the Western District of Pennsylvania. I indicated my interest in one of those vacancies to both Senator Arlen Specter and Senator John Heinz. However, thereafter I withdrew my name from consideration (at that time I had three children in school who were involved in a constant stream of activities. I was vicariously enjoying the high school experience I never had). In January of 1987, I wrote a letter to the Justice Department and indicated my interest in the vacancy which existed for the United States Court of

Appeals, Third Circuit and notified once again Senator Specter and Senator Heinz that I would be interested in a federal appointment. In the spring of 1987, I met Senator Arlen Specter informally. He informed me that there would be a vacancy on both the United States District Court, and on the United States Court of Appeals. He suggested that I submit my name for consideration. I did so. In the summer of 1987, a Judge from the U.S. District Court told me that if "they would appoint somebody like you" he would take senior status. Once again I informed both Senators of this conversation. In December of 1987 I was notified by the selection commission from my jurisdiction that I should submit my application. In January of 1988, I was invited to come before the commission for an interview. They recommended my nomination. In February of 1988, I was invited to Washington, D.C. for interviews at the Justice Department. I interviewed with three individuals.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question?

No, except that I was asked if Pennsylvania had capital punishment. I replied that it does. I was asked if that caused me any difficulty or words to that effect. I replied that it did not. I had taken an oath to apply the law, which I did. I was asked if I had ever imposed the death penalty. I replied that I had.

5. Please discuss your views on the following criticism involving "judicial activism".

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The criticism in general refers to the times when the Court fails to abide the separation of powers doctrine. I believe adherence to the doctrine is a necessary corollary to and ingredient of the dynamic equalibrium which exists between the branches of government. The source of power in our government is the people. The power is delegated to their representative legislature to enact laws. The work of the Courts is not to legislate, but to give judicial effect to legislative pronouncements. If we do more, while the results may be popular, we risk our institutional capital--judicial prestige. This is the most effectual basis to insure compliance by the other branches and the people. I am concerned when approval of the actions of the court depends upon pleasure with results without equal concern with the purity of the process. The essence of the judicial function is reason- reason based upon rule of institutionally and politically approved laws--reason which contests the law only when it runs afoul of the supreme law, or, when governmental action incurs upon protected individual rights.

AFFIDAVIT

I, Richard L. Nygaard, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

5-31-88 (DATE)

Richard Lowell Nygaard (NAME)

Suzanne R. Welker (NOTARY)

Suzanne R. [illegible], Notary [illegible]
[illegible]
M[illegible] 8

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Standing Committee on Federal Judiciary
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June 27, 1988

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: RICHARD LOWELL NYGAARD
United States Court of Appeals
Third Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Richard Lowell Nygaard for appointment as Judge of the United States Court of Appeals for the Third Circuit.

A substantial majority of our Committee is of the opinion that Judge Nygaard is "Qualified" for this appointment. The minority found him to be Not Qualified.

Sincerely yours,

Harold Tyler
Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

Judicial
Selection
Project

800 New Jersey Avenue, N.W. ■ Washington, D.C. 20001 ■ 202/662-9834

NANCY B. BROFF
Director

NAN ARON
Chair

STEERING COMMITTEE

LINDA BERG
National Organization for Women

DAVID CASHDAN, ESQ

JULIE CLARK
National Legal Aid and
Defender Association

DAVID COHEN
Advocacy Institute

ARMAND DERFNER, ESQ

NANCY EBB
Children's Defense Fund

JOAN GRAFF
Employment Law Center

LaMAR HAYNES
National Education Association

ELAINE JONES
NAACP Legal Defense
and Education Fund, Inc

JANET KOHN
AFL-CIO

MARSHA LEVICK
NOW Legal Defense and
Education Fund

ANN LEWIS
Americans for Democratic Action

ANN MACRORY
Washington Lawyers' Committee
for Civil Rights Under Law

KATE MICHELMAN
National Abortion Rights Action League

MARIO MORENO
Mexican-American Legal Defense
and Education Fund

IRENE NATIVIDAD
National Women's Political Caucus

RALPH NEAS
Leadership Conference
on Civil Rights

ANTHONY PODESTA
People for the American Way

TIMOTHY PRATT
NAACP

LEN RUBENSTEIN
Mental Health Law Project

HERMAN SCHWARTZ
American University Law School

WILLIAM TAYLOR, ESQ

ELLYN WEISS, ESQ

CAROLE WILSON
International Union of
Electronic Workers, AFL-CIO

CLAUDIA WITHERS
Women's Legal Defense Fund

August 10, 1988

The Honorable Joseph Biden
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

The Judicial Selection Project of the Alliance for Justice requests an opportunity to testify regarding the nomination of Richard Nygaard to the Third Circuit Court of Appeals. The Project has a number of concerns about Mr. Nygaard's qualifications for a lifetime position to the federal bench. We would like an opportunity to bring these concerns to the Senate Judiciary Committee's attention.

Sincerely,

Nan Aron

Nan Aron
Chair

cc: The Honorable Patrick Leahy
The Honorable Paul Simon

A Project of the Alliance for Justice

Participating Alliance Members: Business and Professional People for the Public Interest; Center for Law and Social Policy; Center for Law in the Public Interest; Center for Public Representation; Center for Science in the Public Interest; Education Law Center; Employment Law Center; Equal Rights Advocates; Food Research and Action Center; Institute for Public Representation; Juvenile Law Center of Philadelphia; Mental Health Law Project; National Education Association; NOW Legal Defense and Education Fund; National Women's Law Center; Native American Rights Fund; New York Lawyers for the Public Interest; Public Advocates, Inc.; Sierra Club Legal Defense Fund; Women's Law Project; Women's Legal Defense Fund.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Alex Robert Munson

2. Address: List current place of residence and office address(es).

Residence: P.O. Box 356 CHRB
Saipan, CM 96950

Office: High Court of the Trust Territory of the Pacific Islands
P.O. Box CHRB
Saipan, CM 96950

3. Date and place of birth.

September 25, 1941
South Gate, California

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

I was married on June 29, 1968, to Kathleen Rae Abernathey Munson, an elementary school teacher not presently teaching.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

El Camino College	1959-1962	60 units, no degree sought
Long Beach State College	1962-1964	B.A. (Education)
Long Beach State College	1964-1965	M.A. (Education)
University of Southern California	1965-1970	Ed.D. (Higher Education)
Pepperdine University	1967-1968	33 units, no degree sought
Loyola University School of Law	1972-1975	J.D.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

August 1982 - Present

United States Department of the Interior

Supervisor, Ms. Kittie Baier, Assistant Secretary, Office of International and Territorial Affairs, Washington, D.C. 20240, (202) 343-4736

Place: Trust Territory High Court, Saipan, CM 96950

Type of Work: Chief Justice of the High Court

Reason for leaving: Not applicable

February 1978 - August 1982

Law Offices of Kirtland & Packard, 626 Wilshire Boulevard,
Los Angeles, California 90017, (213) 624-0931

Supervisors: Mr. Robert C. Baker, Managing Partner, now with Baker, Silberberg and Keener, 2850 Ocean Park Boulevard, Suite 300, Santa Monica, CA 90405, (213) 399-0900, and
Mr. Robert C. Packard, Senior Partner

Type of work: Litigation attorney

Reason for leaving: Job advancement

July 1977 - February 1978

Law Offices of Robert S. Talbert and Associates, 3450 Wilshire Boulevard, Suite 1212, Los Angeles, CA 90010, (213) 487-1660, (213) 487-5051

Supervisor: Mr. Robert S. Talbert (retired), residence 258 Hunter's Point, Thousand Oaks, CA 91361, (805) 373-6883

Type of work: Litigation attorney

Reason for leaving: Job advancement

February 1976 - July 1977

Inglewood Unified School District, 401 South Inglewood Avenue, Inglewood, CA 90301, (213) 419-2500

Supervisors: Mr. Jesse Jones, Principal, Morningside High School, and Mr. Edward Washington, Vice Principal of Curriculum and Instruction

Type of work: Substitute teacher, February 1976 - August 1976; Biology teacher September 1976 - July 1977

Reason for leaving: Quit to practice law

September 1975 - February 1976

Unemployed to tour western and eastern Europe, Russia, and North Africa

Supervisor, type of work, reason for leaving: Not applicable

September 1974 - August 1975

Inglewood Unified School District, 401 South Inglewood Avenue, Inglewood, CA 90301, (213) 419-2500

Type of work: Substitute high school teacher while attending law school

Reason for leaving: Quit for world travel to study world cultures, economics, political systems, history, and geography

August 1973 - May 1974

Unemployed; attended law school

Supervisor, type of work, reason for leaving: Not applicable

June 1973 - August 1973

David Halstrom Private Detective Agency, 1300 West Olympic Boulevard, third floor, Los Angeles, California

Supervisor: David Halstrom

Type of work: Process server

Reason for leaving: To attend law school

June 1971 - September 1973

La Verne College, Inglewood Extension Center, Christian Church, Crenshaw & 97th, Inglewood, CA

Supervisor: Mr. James Horner, La Verne College, La Verne, CA 91750

Type of work: Lecturer in School Administration

Reason for leaving: To attend law school

September 1971 - July 1972

Inglewood Unified School District, 401South Inglewood Avenue, Inglewood, CA 90301, (213) 419-2500

Supervisor: Dr. Kenneth Moffit, Principal, Monroe Junior High School

Position: Teacher of Opportunity Class (students who had behavioral problems and could not function in regular school)

Reason for leaving: To attend law school

September 1970 - August 1971

Torrance Unified School District, Torrance, California

Supervisor: Dr. Harold Klonacy, Principal, Torrance High School

Type of work: Director of Student Activities

Reason for leaving: To return to teaching

July 1970 - September 1970

Inglewood Unified School District, 401 South Inglewood Avenue,
Inglewood, CA 90301, (213) 419-2500

Supervisor: Mr. Edward Washington

Type of work: High school teacher of U.S. History

Reason for leaving: Job advancement

September 1969 - July 1970

Unemployed to tour the United States, Western Europe, North Africa, the Middle East, India, the Far East, and the Orient to study world customs, cultures, economics, political systems, history and geography, art and literature

Supervisor, position, reason for leaving: Not applicable

September 1965 - August 1969

Inglewood Unified School District, 401 South Inglewood Avenue,
Inglewood, CA 90301, (213) 419-2500, Opportunity High School

Supervisor: Dr. James Harrison, Principal, September 1965 - August 1966; Mr. Vincent Migliazzo, Principal, September 1966 - July 1969

Type of work: High school teacher of World History, Geography and Biology

Reason for leaving: Quit for world travel

September 1964 - September 1965

Inglewood Unified School District, 401 South Inglewood Avenue,
Inglewood, CA 90301, (213) 419-2500

Type of work: Substitute high school teacher

Reason for leaving: Not applicable

September 1964 - June 1965

Long Beach State College, Long Beach, California

Supervisor: Dr. Warren Boring

Type of work: Teaching Assistant, Wrestling, and Weight Training Coach

Reason for leaving: Graduated with Master's degree and started teaching

March 1963 - September 1964

Los Altos Liquor Store, Bellflower Boulevard and Los Altos Street, Long Beach, California

Supervisor/owner: Mr. John Cleveland (deceased)

Position: Sales Clerk

Reason for leaving: To become Teaching Assistant

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

   Fully funded scholarship from G. D. Searle Pharmaceutical Company to write my Doctoral dissertation at the University of Southern California.

   Fully funded athletic scholarship for wrestling, Long Beach State College, 1962-1964.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Name and address	Dates of membership
American Bar Association 750 North Lakeshore Drive Chicago, IL 60611	1975 to present
California Bar Assoication 555 Franklin Street San Francisco, CA 94102	1977 to present
Los Angeles County Bar Assn 617 South Olive Street Los Angeles, CA 90014 (mailing address, P.O. Box 55020 Los Angeles, CA 90055)	1978 to 1982
International Law Society (legal students' organization) Loyola University School of Law, Los Angeles, California	1972 to 1975 (Vice President, 1973 President, 1974)

Chairman of Committee to Certify the Status of Ponape, Kosrae and Truk of the Federated States of Micronesia as courts of record.

Attended 9th Circuit Annual Meetings in 1983, 1985, 1986 and 1987. Participated in small group problem-solving sessions.

Attended and co-hosted the South Pacific Judicial Conference held in Saipan, 1974.

Attended South Pacific Judicial Conference, 1987, in Aukland, New Zealand.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Reader for the Braille Institute of Los Angeles

Society of Higher Education, Dr. Pullias Lectureship, University of Southern California

University of Southern California Alumni Association

Loyola Law School Alumni Association

Phi Delta Kappa (professional education fraternity), Long Beach State College, Long Beach, California

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

California Bar Association	June 28, 1977
United States District Court C.D. of California	September 29, 1977
High Court of the Trust Territory of the Pacific Islands	August 18, 1982
United States Supreme Court	September 15, 1982
U.S. District Court of the Northern Mariana Islands	April 4, 1982
Supreme Court of the Republic of Palau	May 28, 1986

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Writings: Some Effects of Anabolic Steroids During Weight Training, 30 Dissertation Abstracts 5272 (1970). Copy not available but can be obtained from University of Michigan or University of Southern California.

13. Health: What is the present state of your health? List the date of your last physical examination.

    Excellent. Last physical examination, November 23, 1987.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

    I am currently serving as Chief Justice of the Trust Territory of the Pacific Islands High Court. I was appointed to this position on August 18, 1982 by James G. Watt, Secretary of the United States Department of the Interior.

    Since September 1982 I hve been assigned by the Chief Judge of the Ninth Circuit of the United States and designated by the Presiding Judge of the United States District Court for the Northern Mariana Islands as a trial judge for the District Court and as an appellate judge of the Commonwealth Court of the Northern Mariana Islands.

    I have also served since 1983 as a designated Judge of the Commonwealth Court of the Northern Mariana Islands, a court of general jurisdiction, to hear trials and to preside at disciplinary proceedings of the Commonwealth Bar.

    The Appellate Division of the Trust Territory High Court is the court of last resort in Micronesia. All cases of the Trust Territory High Court, both the Trial Division, a court of general jurisdiction, and the Appellate Division, are reported in the Trust Territory Reports Volumes 1-7 (1951-1978). Volume 8 (1978-1987) is being printed.

    The duties of the Chief Justice include:

    Presiding Justice of the Appellate Division to hear appeals from the Trial Division of the High Court and to review final judgments on certiorari from the Supreme Courts of the Republic of the Marshall Islands, the Federated States of Micronesia, and the

Republic of Palau. Each of the above jurisdiction has different laws.

Judge of the Trial Division of the High Court in the Marshall Islands, Pohnpei (formerly Ponape), Kosrae, Truk, Yap and Palau. Each of the above jurisdictions has different traditional customs that must be considered in rendering a judgment.

Administrator and supervisor of all Trust Territory courts and the courts' personnel.

Assigns cases to the various appellate justices and the trial judges.

Prepares rules of pleading, practice and procedure.

Prepares monthly reports to the Solicitor of the Department of the Interior and the High Commissioner of the Trust Territory of the Pacific Islands.

Prepares annual budget.

Prepares data concerning the Judiciary for the annual United Nations Report.

Provides training for District judges and trial assistants.

Orders the admission of attorneys to practice in the Trust Territory courts, examines trial assistants and admits them to practice, and disciplines trial counsel when necessary.

In performing the administrative and consultative duties, the Chief Justice confers and corresponds with numerous governments' personnel, both within and out of the Trust Territory; with judges and court attaches in other jurisdictions; with personnel attached to the State Department, the Department of the Interior, and the Administrative Office of the United States courts; with visiting dignitaries such as Congressional committees and the United Nations Visiting Mission; and with indigenous island leaders.

15. Citations: If you are or have been a judge, provide: (l) citations

for the ten most significant opinions you have written: (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Please see Appendix A.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I never served as clerk for a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I never practiced law alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

1977-1978	Associate Robert S. Talbert and Associates Hartford Insurance Company 3450 Wilshire Boulevard, Suite 1212 Los Angeles, California 90010 (213) 487-1660, (213) 487-5051
1978-1982	Associate Kirtland & Packard 626 Wilshire Boulevard Los Angeles, California 90017 (213) 624-0931

5. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

1977-1978

At Talbert and Associates, I worked closely with Robert S. Talbert, now retired (805) 379-1974. I was defense counsel for lawsuits filed against Hartford Insurance Company's insured. The lawsuits I handled and tried involved motor vehicle collisions, premises liability, employment discrimination, construction claims, fire loss, and product liability.

1978-1982

The law firm of Kirtland & Packard specializes in the defense and trial practice of professional persons involving defendants such as hospitals, doctors, lawyers, architects, engineers, accountants, general contractors, real estate brokers, nurses, dentists, and other professional people.

I specialized in medical and legal malpractice defense. Further, I had considerable experience in the defense of product liability cases including, but not limited to, aviation disasters, industrial machinery products, and residential and consumer products.

While at Kirtland & Packard, I had the opportunity to work closely with Robert C. Baker, who was the firm's managing partner, now of Baker, Silberberg and Keener, (213) 399-0900. Mr. Baker was generous with his time and assistance and is very familiar with the work I did at the firm. Another attorney with

whom I worked very closely is Robert C. Packard, (213) 624-0931. Mr. Packard also took a special interest in my development at the firm and is familiar with many of the projects on which I worked. Other attorneys at Kirtland & Packard with whom I worked closely are: Harold J. Hunter, Jr., Phillip T. Baker, and Jacques E. Soiret.

The following attorneys in the Los Angeles, California area are also familiar with my professional qualifications on the basis of my pre-judicial experience:

The Hon. Dickran M. Tevrizian, Jr.
Judge, United States District Court
United States Courthouse
312 North Spring Street, Room 751
Los Angeles, California 90012
(213) 894-4047

The Hon. William J. Rae
Judge, United States District Court
Central District of California
Los Angeles, California 90012
(213) 894-0466

Robert C. Reback, Attorney at Law
Butler. Dan & Reback
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017
(213) 627-6041

Marshall Silberberg, Attorney at Law
Baker, Silberberg & Keener
2850 Ocean Park Boulevard, Suite 300
Santa Monica, California 90405
(213) 399-0900

Karl A. Keener, Attorney at Law
Baker, Silberberg & Keener
2850 Ocean Park Boulevard, Suite 300
Santa Monica, California 90405
(213) 399-0900

Steven Van Sicklen, Attorney at Law
Baker, Silberberg & Keener
2850 Ocean Park Boulevard, Suite 300
Santa Monica, California 90405
(213) 399-0900

Alexander H. Good, Attorney
Director General
U.S. Department of Commerce
Washington, D.C.
(202) 377-5777

Thomas V. Girardi, Attorney at Law
Girardi, Keese & Crane
445 South Figueroa, Suite 1750
Los Angeles, California 90071
(213) 489-5330

George E. Moore, Attorney at Law
523 West 6th Street, Suite 623
Los Angeles, California 90014
(213) 622-6661

James J. Pagliuso, Attorney at Law
Harney, Wolfe, Pagliuso, Shaller & Carr
201 North Figueroa, Suite 1300
Los Angeles, California 90012
(213) 482-0881

Joel B. Douglas, Attorney at Law
Bonne, Jones, Bridges, Muller & O'Keefe
600 South Commonwealth Avenue, Suite 1700
Los Angeles, California 90005
(213) 480-1900

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

While in private practice I appeared in court regularly two to four times a week to argue motions or to seek or defend against petitions for injunctive relief. During my first year at Kirtland & Packard, I often appeared and argued motions in two to five different departments three to five days a week. During the remainder of my tenure at Kirtland & Packard, in addition to appearing on Law and Motion matters, I was in trial two to three months per year. Most of my trials lasted from two to six weeks. Additionally, I appeared at arbitration proceedings two or three times per year.

2. What percentage of these appearaces was in:
    (a) federal courts;
    (b) state courts of record;
    (c) other courts.

(a) Federal courts

10%

(b) State courts of record

80%

(c) Other courts

10%. Court sanctioned arbitration proceedings.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

(a) Civil

90%

(b) Criminal

10%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

During my last year at Loyola Law School, I was enrolled in a clinical program for criminal law. During the second semester, I was assigned to the Los Angeles County District Attorney's office wherein I conducted preliminary hearings for felony cases and represented the State in the prosecution of 11 entire misdemeanor jury trials. My supervising attorney was Mr. Ronald Carpol, now in private practice in Malibu, California, (213) 456-3683.

In private practice, I tried nine cases to a verdict and five cases to a judgment. In all cases I was sole counsel save for one case where I was associate counsel with Mr. Robert C. Baker, (213) 399-0900.

In approximately 12 arbitration proceedings, I was sole counsel for my clients.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

   (a) Jury:

   80%

(b) Non-jury:

20%

18. Litigation. Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I. Shauna Tamar Curlender, a minor, by and thorugh Hyam Curlender, her Guardian Ad Litem vs. Bio-Science Laboratories, Automated Laboratory Sciences and Jerome Schaffer, M.D., Case No. NWC 67512 and Hyam Curlender and Phillis Curlender vs. Bio-Science Laboratories, et al., Case No. NWC 67504, filed in the Superior Court of the State of California for the County of Los Angeles, Van Nuys courthouse.

Action for wrongful life. The Curlenders sought advice from my client, Dr. Schaffer, regarding whether they were carriers of the Tay-Sachs disease gene. The Curlenders claimed that testing and handling of blood by Bio-Science and Automated was negligently done and that Mrs. Curlender was erroneously advised by Dr. Schaffer that she was not a carrier of the genetic defect. In reliance on that advice, the Curlenders proceeded to have a daughter, Shauna, who was born with Tay-Sachs disease. Tay-Sachs is a fatal, degenerative, neurological disorder. Children with Tay-Sachs, born normal at first, begin to deteriorate at approximately nine months of age and die between ages three to seven, depending on the quality of care which they receive. The Curlenders' child, Shauna Curlender, was born in November 1977, and died in October 1983.

In settlement of the Curlenders' case (which involved an action by the child for wrongful life), Bio-Science paid $1.6 million for all general and special damages and emotional distress, including all medical bills of Shauna Curlender from her birth and for her lifetime. In June 1981 at a mandatory settlement conference on the main action, conducted by Judge Di Guiseppe, Automated had only been willing to offer $15,000 and Dr. Schaffer $100,000. At that time, when the constitutionality of Civil Code Section 3333.2 was in doubt, Shauna Curlender was a plaintiff and the Court of Appeal had held she could recover for pain and suffering. Curlender v. Bio-Science, 106 Cal.App.3d 811 (1980). Consequently, Bio-Science settled for all defendants and pursued its comparative indemnity action separately.

In 1985, judgment was entered against Dr. Schaffer for $9,840.00. Robert C. Baker tried the case as I had left the firm in August 1982.

I interviewed and deposed all witnesses and over 15 experts, performed all discovery and conducted all of the medical research to prepare this case for trial.

Counsel for the parties were:

Ronald Wrinkle Hurley and Grassini 11313 Weddington Street North Hollywood, CA 91601 (213) 877-5422 (213) 763-4318	Attorneys for Plaintiffs
Ms. Chee Davis Gibson, Dunn & Crutcher 515 West Flower Street Los Angeles, CA 90071 (213) 488-7000	Attorneys for Bio-Science
Paul De Montesquiou Dummit & Agajanian 11620 Wilshire Blvd., Suite 200 Los Angeles, CA 90025 (213) 820-5689	Attorneys for Automated Laboratory Sciences

Kirtland & Packard
626 Wilshire Blvd., 6th floor
Los Angeles, CA 90017
(213) 624-0931

Attorneys for
Dr. Schaffer

2. I. N. Kraushaar, M.D. vs. St. Paul Fire and Marine Insurance Company, and Does I-XX, inclusive; St. Paul Fire and Marine Insurance Company vs. I. N. Kraushaar, The Phoenix Insurance Company, Robert Fierro and Soledad Medina; The Phoenix Insurance Company vs. St. Paul Fire and Marine Insurance Company, I. N. Kraushaar, Robert Fierro, Elaine Fierro, Michelle Fierro, Soledad Medina, and Does I through L, inclusive; formerly pending in the United States District Court for the Central District of California, Case No. CV 77-2930--DWW.

This case was originally filed in the Superior Court of the State of California for the County of Los Angeles on June 21, 1977. The case was removed to Federal Court and plaintiff's original attorney substituted out. My firm substituted in on October 13, 1977. The complaint sought a Declaration of Rights and Liabilities under an insurance policy. Subsequently two counter claims were filed to determine which of two insurance companies would have to defend and indemnify the plaintiff for underlying medical malpractice lawsuits. Vigorous discovery was conducted for two years and on the eve of trial St. Paul Insurance Company and The Phoenix Insurance Company agreed that the plaintiff indeed did have insurance coverage from one or both of the companies.

Dr. Kraushaar was dismissed and the two insurance companies tried the case before the Honorable David W. Williams to dertermine who would bear the expense of defense costs and indemnification. The Phoenix Insurance Company prevailed. I solely represented Dr. I. N. Kraushaar, M.D. in all aspects of the litigation. Attorney for counter-claimant and counter defendant, The Phoenix Insurance Company, was Joel B. Douglas of Bonne, Jones, Bridges, Mueller and O'Keefe, 600 South Commonwealth Avenue, Suite 1702, Los Angeles, California 90005, (213) 480-2900. Attorney for defendant and counter-claimant, St. Paul Fire and Marine Insurance Company, was Arthur Paul Berg, 615 South Flower Street, Suite 1900, Los Angeles, California 90017, (213) 687-8305.

3. Ismael Garcia vs. County of Los Angeles, U.S.C. Medical Center; Garfield Hospital, California Emergency Physicians, Lanny Forman, M.D.; and Does 1 through 100, inclusive, filed in the Superior Court of the State of California for the County of Los Angeles, Case No. C 94149.

The plaintiff on September 7, 1973, was riding as a passenger in a 1965 Ford van. The van was involved in an automobile accident with another vehicle which struck the rear of the van and knocked it off the freeway. Plaintiff was 30 years old at the time and was working at Barker Brothers as a refrigerator repairman.

The plaintiff was transferred by ambulance to Garfield Hospital Emergency Room and remained there for a period of approximately five hours. Because he was believed not to have had medical insurance, he was then transferred to Los Angeles County U.S.C. Medical Center where he had surgery consisting of an exploratory laparatomy. Hemmorrhage was found in the peritoneal cavity and he subsequently developed a paralysis at thoracic vertebra number 8 level. It was alleged that Dr. Forman, the emergency room physician, by not transferring this patient earlier, or indeed by not requesting a surgical consult at an earlier time, fell below the standard of medical care and practice in the community and the delay in the surgical procedure caused the patient to suffer the paraplegia that he now experiences.

The significance of this case was that it alerted doctors that the community would not tolerate doctors and hospitals that refuse or delay treatment to suspected indigent patients.

I was co-defense counsel with Robert C. Baker, (213) 399-0900, then of Kirtland and Packard, for Garfield Hospital, California Emergency Physicians, and Lanny Forman, M.D. I took the depositions of experts that testified for plaintiff, reviewed summaries, and indexed all depositions and pleadings in preparation for trial, reviewed and indexed all medical records, prepared motions in limine to exclude plaintiff's economic report, and to exclude any evidence that Dr. Forman transferred the plaintiff as a result of lack of insurance, and interviewed and deposed and prepared all witnesses for our clients. A jury trial began on January 8, 1979, in Department 52 of the Los Angeles Superior Court, the Honorable Rafael Galceran presiding, and continued for 42 court days until March 19, 1979, when there was a verdict for the plaintiff in the net amount of $775,000 and for the defendants County of Los Angeles and Dr. Lanny Forman. Garfield Hospital filed a Notice of Appeal on June 15, 1979. On August 21, 1979, the case was settled for $500,000 and the appeal was abandoned and dismissed.

Attorneys for the plaintiff were Berk, Bise and Alpern Law Offices and Lintz, Williams & Rothberg, 15236 Burbank Boulevard, Van Nuys, California 91411, (213) 988-6050, 873-4755, by Hal W. Williams, Jr.

Co-defendant County of Los Angeles was represented by Alan Rushfelt of Home and Clifford, 4605 Lankershim Boulevard, North Hollywood, California 91602, (213) 877-5494.

Intervenor Fidelity and Casualty Company of New York was represented by Zonni, Ginocchio and Taylor, 3355 Glendale Boulevard, Los Angeles, California 90039, (213) 666-8923.

4. Conrad R. Kohrs vs. Robert W. Boyd, M.D., Richard L. Holmes, M.D., Eli Lilly and Company, Dell Laboratories, Inc., Carter-Glogau Laboratories, Chromalloy Pharmacy, Inc., Wyeth Laboratories, Inc., Becton, Dickinson & Co., and Does 1 through 100, including each and every number between 1 and 100, inclusive, filed in the Superior Court of the State of California for the County of Los Angeles, Santa Monica courthouse, Case No. WEC 45911, Complaint for Damages (for Breach of Medical, Professional Obligation; Breach of Warranty; and Strict Liability in Tort).

Plaintiff presented himself at Dr. Holmes' office at midnight with an eye infection and severe pain. Dr. Holmes diagnosed the condition as possible endophthalmitis. The standard of care required immediate massive doses of antibiotics and immediate hospitalization. If not treated, the universal result is loss of the eye. Dr. Holmes treated plaintiff with Vitamin B-12 that was contaminated. Plaintiff lost his eye.

I deposed medical experts and interviewed many other experts for the purpose of conducting an experiment with vitreous humor infected with bacillus serus to determine the rate of growth of the virus to defend against causation. Additionally I reviewed all depositions, interrogatories and requests for admission in preparation of trial.

The case was tried to a jury from December 15 to December 30, 1981. Judgment was in favor of defendants and against plaintiff.

The plaintiff failed to prove causation as the bacillus serus that caused the infection is extremely fast acting. At the time of the first manifestation of the condition, the probability of irrevocable injury was well within a medical certainty.

Demand was $450,000 for Dr. Holmes. There was no offer. I interviewed all experts, examined medical records, reviewed and edited the depositions in preparation of trial, deposed witnesses, and propounded interrogatories and requests for admissions.

David M. Harney Harney and Moore 650 So. Grand Ave., No. 1200 Los Angeles, CA 90017 (213) 626-8761	Attorneys for Plaintiff
Winchester Cooley, III McCutchen, Black, Verleger & Shea 3435 Wilshire Blvd., 30th floor Los Angeles, CA 90010 (213) 381-3411	Attorneys for Eli Lilly and Company
Howard A. Slavin Chase, Rotchford, Drukker & Bogust 606 S. Olive St., 22nd floor Los Angeles, CA 90014 (213) 626-8711	Attorneys for Del Laboratories, Inc.
Edwin B. Warren 3701 Wilshire Boulevard Los Angeles, CA 90010 (213) 480-3891	Attorney for Robert W. Boyd, M.D.
Richard W. Tentler Hillsinger & Costanzo 3055 Wilshire Blvd., 7th floor Los Angeles, CA 90010 (213) 388-9441	Attorneys for Becton, Dickson & Company
Harold J. Hunter, Jr. Kirtland & Packard 626 Wilshire Blvd. Los Angeles, CA 90017 (213) 624-0931	Attorneys for Richard L. Holmes, M.D.

Lee B. Wenzel
Morgan, Wenzel & McNicholas
1545 Wilshire Blvd.
Los Angeles, CA 90017
(213) 483-1961

Attorneys for Wyeth
Laboratories, Inc.

George McCarthy
Haight, Dixon, Brown, etc.
815 Moraga Drive
Los Angeles, CA 90049
(213) 476-6525

Attorneys for Chromalloy
Pharmacy, Inc. and Carter-Glogau Laboratories

5. Erick Fletcher, et al. vs. Shell Oil Company, Dow Chemical Company, CIBA Chemical Company and Does I through 50, inclusive, filed in the Superior Court of the State of California for the County of Los Angeles, Case No. WEC 38519. Complaint for Negligence, Strict Liability, Loss of Consortium, Punitive Damages.

Plaintiff claimed that during his employment he came in contact with chemicals including trichlorethylene which my client, Ciba Geigy Corporation, was involved with in the chain of distribution of the product. The chemicals were alleged to have caused the plaintiff to become paralyzed after being exposed to a fire. Eventually the plaintiff sued the sixteen defendants listed below and all defendants cross-claimed against each other. After three years of extensive discovery I filed a motion for summary judgment based upon the fact that my client was in no way involved with the product. The motion was granted and my client was dismissed as a defendant and all of the cross-complaints were dismissed.

I propounded interrogatories and requests for admission, attended all depositions, deposed the plaintiff, his witnesses and experts, and prepared this case for trial.

The parties and their attorneys were:

David Henry Simon
Law Offices of David Henry Simon
924 Westwood Blvd., Suite 600
Los Angeles, CA 90024
(213) 208-5511

Attorneys for Plaintiffs

Don Fesler LaFollette, Johnson, Schroeter & DeHaas 320 North Vermont Avenue Los Angeles, CA 90004 (213) 433-7610	Attorneys for The Dow Chemical Co.
John Geary Chase, Rotchford, Drukker & Bogust 606 So. Olive St., 22nd floor Los Angeles, CA 90014 (213) 626-8711	Attorneys for Van Waters & Rogers
Alex R. Munson Kirtland & Packard 626 Wilshire Boulevard Los Angeles, CA 90017 (213) 624-0931	Attorneys for Ciba-Geigy Corp.
Francis Breidenbach Breidenbach, Swainston, Yokaitis & Crispo 888 West 6th St., Suite 1400 Los Angeles, CA 90017 (213) 624-3431	Attorneys for Shell Oil Company
Phil Boesch Kinsella, Boesch, Fujikawa & Towle 2029 Century Park East Suite 1690 Los Angeles, CA 900678 (213) 552-9496	Attorneys for Diamond-Shamrock
James E. Cusick Law Offices of James E. Cusick 4201 Wilshire Boulevard Los Angeles, CA 90010	Attorneys for Baron-Blakeslee

Goethals & Swanson 1200 Wilshire Blvd., Suite 212 Los Angeles, CA 92701	Attorneys for Chemcentral
John Costanzo Law Offices of Hillsinger & Costanzo 3055 Wilshire Blvd., 7th floor Los Angeles, CA 90010 (213) 388-9441	Attorneys for P.P.G. Industries, Inc.
Warren Kaufman Law Offices of Warren Kaufman 9911 W. Pico Blvd., Suite 800 Los Angeles, CA 90035	Attorneys for Hooker Chemicals
Lana Feldman Yusim, Cassidy, Stein & Hanger 8383 Wilshire Blvd., Suite 330 Beverly Hills, CA 90211 (213) 595-8714	Attorneys for Ashland Oil
Bruce Dunn Bolton, Nember & Dunn 12th floor, Hilton Center 900 Wilshire Boulevard Los Angeles, CA 90017	Attorneys for Western Chemical & Manufacturing Co.
Friedrich W. Seitz Murchison & Cumming Post Office Box 75965 Los Angeles, CA 90075 (213) 382-8=7321	Attorneys for Internation Minerals & Chemical Corp.
Robert M. Dean Spray, Gould & Bowers 3550 Wilshire Blvd., 11th floor Los Angeles, CA 90010 (213) 385-3402	Attorneys for M & T Chemicals
George Williams Robert S. Talbert & Associates 3540 Wilshire Blvd., Suite 1212 Los Angeles, CA 90010	Attorneys for Rho-kem Corp.

Charles Collett Booth, Mitchel, Strange & Smith 3200 Bristol St., Suite 650 Downey Savings Building Costa Mesa, CA 92626 (213) 641-0217	Attorneys for Foremost-McKesson
Jeffrey E. Wulkan Murphy & Gold 3435 Wilshire Blvd., Suite 918 Los Angeles, CA 90010 (213) 937-4422	Attorneys for MICA Corporation

6. Edward T. Dyer vs. Bauer Hospital, St. Mary Medical Center, Dr. Wilmer J. Irvine, and Does 1 through 20, inclusive, filed in the Superior Court of the State of California for the County of Los Angeles, Case No., SOC 44227, Long Beach courthouse

Plaintiff sustained compression fractures of vertebral bodies post surgically when he fell. Plaintiff contended his fall was caused by improper drug amounts and duration prescribed by Dr. Irvine. Further, plaintiff alleged negligence for failure to order restraints and failure to build the plaintiff's hemoglobin and hematocrit post operatively which caused him to be semiconscious and stuporous.

Jury trial, Department M, Honorable Robert Wenke, March 1979. Voluntarily dismissed after six days of trial. I was sole counsel for Dr. Irvine. I prepared the entire case for trial, deposed all witnesses and experts, prepared all witnesses, prepared motions in limine, and prepared jury instructions.

Plaintiff was represented by Robert C. Fortune, 100 Oceangate, Suite 1200, Long Beach, California 90802, (213) 435-2427. Saint Mary Medical Center dba Bauer Hospital was represented by Joseph B. Crowther of Early, Maslach, Boyd & Levy, 4680 Wilshire Boulevard, Los Angeles, California 90010, (213) 933-8161.

7. Lorraine C. Harris vs. Perry Kohan, M.D.; Hector Hermann, M.D.; Dolphin Ambulance; John W. Harris; Baldwin Park Community Hospital; and Does 1 through 50, inclusive, filed in the Superior Court of the State of California for the County of Los Angeles, Pomona courthouse, Case No. EAC 22604.

Jury trial, Department S., Honorable Roy L. Norman, 15 days from February 3 to February 26, 1981. Wrongful death action.

The 15-year old decedent allegedly died from a hypovolemic condition, due to the fact that the defendant doctors replaced his whole blood supply with lactated ringers, dextrose, water, and other blood expanders.

It was alleged that the plaintiff's oncotic pressure gave a false reading on the CVP line, and further that his hematocrit and hemoglobin were concentrated, thus giving false values for hemoglobin and hematocrit.

When Dr. Hermann saw the decedent, he was comatose, non-responsive, had dilated pupils, had no reflexes, and only his autonomic nervous system, i.e., his heart and respiration, were functioning.

It was the plaintiff's contention that Dr. Kohan and Dr. Hermann breached the standard of care and practice by not infusing whole blood into the plaintiff.

Jury verdict for both defendants was 12-0.

Attorneys for plaintiff: Eugene A. Bambic and Laurence Dravone, 13033 Ventura Boulevard, Studio City, California, (213) 986-4682, (213) 872-2180.

Leonard Torres of Patterson, Ritner and Lockwood represented Dr. Kohan, 1543 West Olympic Boulevard, Suite 200, Los Angeles, California 90015, (213) 383-2431.

I was Dr. Hermann's sole attorney. I conducted all work for the trial by myself.

8. Alice M. McCloud vs. James G. Kallins, M.D., James G. Kallins, M.D., Inc., filed in the Superior Court of the State of California for the County of Los Angeles, Case No. C 222 838.

Plaintiff alleged medical malpractice for failure to diagnose a fractured hip.

I prepared this case for trial by reviewing medical records, interviewing experts, and deposing witnesses. Just before trial I discovered the plaintiff had had a history of injuries to the hip area. Plaintiff had not answered interrogatories truthfully nor had she been truthful to her attorney. When her history was discovered she filed a Request for Dismissal and Dr. Kallins consented to waive costs and covenanted not to bring a malicious prosecution against her.

William R. Burkitt Attorney for Plaintiff
Gray, White & Burkitt
301 E. Colorado Blvd., Suite 600
Pasadena, CA 91101
(818) 895-3344, (818) 681-0665

9. Donna Sue Tresemer vs. Morton Barke, M.D., Mario De Lara, M.D., A.M. Robins, Case No. C 157 394 filed in the Superior Court of the State of California for the County of Los Angeles.

Dr. DeLara inserted a Lippes Loop IUD on September 1, 1971. On August 1, 1972, Dr. Barke took out the Lippes Loop and put in a Dalkon Shield. Dr. Barke never saw the plaintiff after August 1, 1972. Plaintiff contended Dr. Barke had the duty to contact her and tell her of potential risks, three-four years later. Plaintiff presented herself at Dr. DeLara's office in March 1973, April 1973, March 1974, and April 1975, for complaints of pain and infection. Dr. DeLara treated the patient for gonorrhea and all symptoms disappeared on each occasion. Plaintiff contended the infections were due to the Dalkon Shield and Dr. DeLara breached the standard of care by not removing the Dalkon Shield. Plaintiff never apprised Dr. DeLara that the Lippes Loop was removed and replaced by the Dalkon Shield until her last visit in April of 1975.

Case tried; trial lasted ten days, from March 27 to April 9, 1981, before the Honorable J. Wesley Reed, Department 34. Co-defendant A. M. Robins settled before trial. Co-defendant Barke received a non suit. Dr. DeLara received a verdict 9-3. The jury was out for two days.

I completed all discovery, research and trial preparation for this case. The case was appealed and the appeal was dismissed on my motion for failure to perfect the appeal. Court of Appeal of the State of California, Second Appellate District Number 65514. The attorneys for the parties were:

For plaintiff Lorraine C. Gollub
Kanarek and Berlin
14416 Victory Blvd., Suite 203
Van Nuys, CA 91411
(213) 782-2790

For Dr. Barke
Terry Molony
Buck, Molony, Nimmo, Ammirato
620 Jergins Trust Building
100 E. Ocean Blvd.
Long Beach, CA 90802
(213) 436-9781

I represented Dr. DeLara.

10. Mary Katz vs. Marshall Cherkas, M.D., filed in the Superior Court of the State of California for the County of Los Angeles, Case No. C 260 420.

Plaintiff claimed she and defendant doctor had sex during psychiatric-patient relationship, causing her to be self-destructive. She slashed her wrists, jumped out of a second story window and took an overdose of medication.

I prepared this case for trial by conducting all discovery, deposing all witnesses, lay and expert, interviewed potential witnesses, and reviewed medical history. Just prior to trial my client consented to settle this matter for $150,000.

George Moore — Attorney for Plaintiff
Harney and Moore
523 West 6th St., Suite 623
Los Angeles, CA 90014
(213) 622-6661

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question; please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

One of the most significant legal activities I have pursued was preparing the courts in Truk, Pohnpei, and Kosrae, located in the Federated States of Micronesia, as courts of record. Specifically, for three years I was the committee chairman to assist in the drafting of judicial acts consistent with the National Constitution for the three states. I wrote, reviewed and revised judicial codes and court rules, and worked closely with the governors and other members of the committees to prepare the courts to function. I worked on their budgets, finances, accounting, the ordering of library materials, office equipment, and all aspects of setting up the respective courts. At the conclusion of the work I assisted in the recommendation and screening of judicial candidates and finally certified the courts to function as courts of record.

Another significant activity I have been involved with is the continuing education and training of trial assistants in all of the districts throughout Micronesia. Trial assistants in Micronesia are not lawyers. I have conducted seminars in Civil Procedure, Criminal Procedure, Evidence, Ethics, Trial Advocacy, Local Rules, Direct and Cross Examination, Criminal Law, Constitutional Law, and other substantive areas of law.

I have also conducted seminars for the National Institute for Trial Advocacy for laywers in the Northern Mariana Islands.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

Not applicable.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Please see Financial Disclosure Report, Appendix B.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

Please see Appendix C.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   Reader for the Braille Institute of Los Angeles three hours a week, 1978-1982.

   I have represented, pro bono, friends of my mother who were indigent in personal injury cases, one criminal case, and I have prepared wills, reviewed sales contracts and lease agreements for people who could not afford to hire a lawyer. From 1977 to 1982 I estimate I devoted one hour a week to pro bono work.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

   No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

   There is no selection commission in the Northern Mariana Islands. In essence I have worked myself out of a job with the High Court of the Trust Territory of the Pacific Islands by certifying the national and state courts as courts of record in accordance with the President's policy to terminate the trust and give maximum independence to the new island nations.

Judge Anthony M. Kennedy, the Chairman of the Pacific Territories Committee of the Judicial Conference of the United States and present nominee for Associate Justice of the United States Supreme Court, recommended me to the Justice Department to be interviewed for this position. I was interviewed by Kenneth T.Cribb, Jr., Counselor to the Attorney General, Stephen S. Trott, Assistant Attorney General, Criminal Division, Richard K. Willard, Assistant Attorney General, Civil Division, and Stephen J. Markman, Assistant Attorney General and Stephen Mathews, Assistant Attorney General, both of the Office of Legal Policy.

The Department of Justice recommended me for the position. President Reagan nominated me for the position and the White House forwarded the nomination to the Senate.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirememnts such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I am familiar with the criticism of those judges whose decisions reflect "judicial activism." I join in that criticism basically, having noted a definite trend during the past 20 years for judges, on both federal and state levels, to overstep the authority mandated to them by the legislature. Increasingly, many judges have interpreted statutes to impose far-reaching results which undermine the traditional threshhold requirements for adjudicating cases or controversies.

A judge must be firmly committed to the intent of the Constitution and the laws passed by Congress. He or she must follow the law, carry out the will of the drafters of the law, and do what a judge is supposed to do, that is, do what the law requires.

Judicial activism upsets the balance of powers. Unlike legislatures and members of the executive branch, judges are removed from the pressures of the political arena, and their entrance into those areas makes government unresponsive to legitimate political control over the processes and operations of government. I disagree with this trend and would be most careful in any judicial position to which I am appointed, as I have been in my current position, not to usurp the authority of the other branches of government.

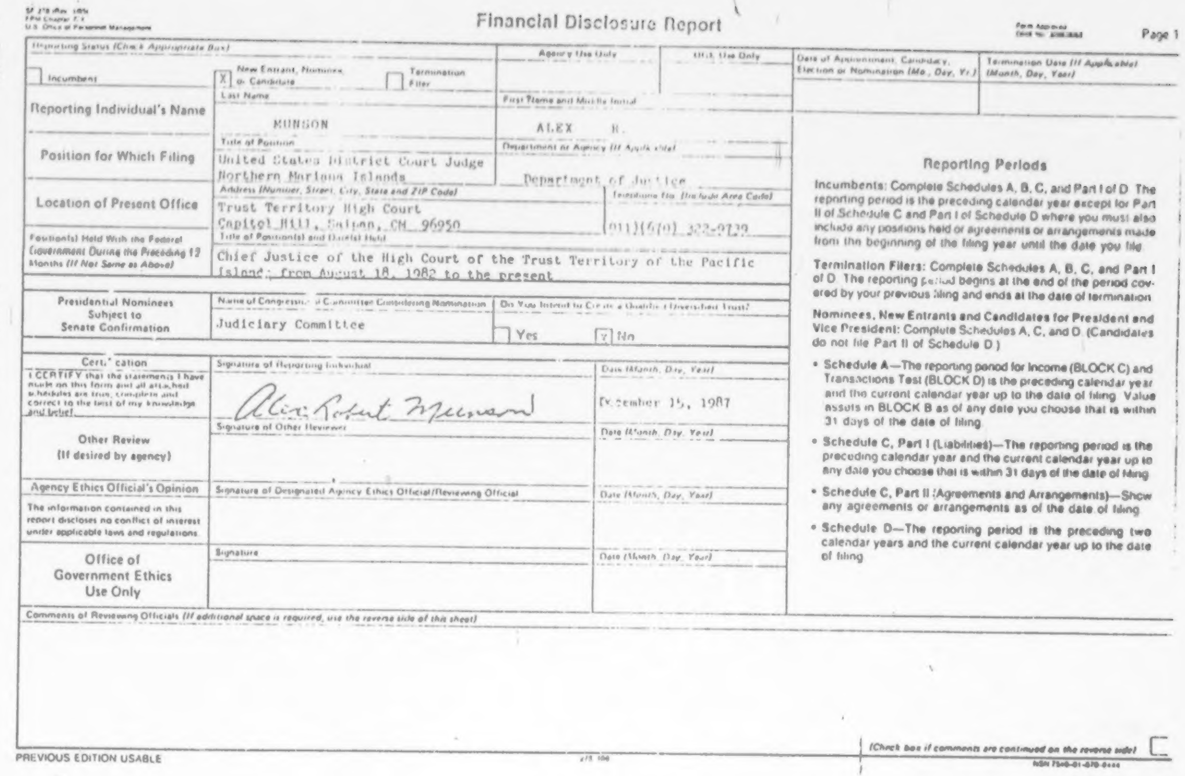
AFFIDAVIT

I, Alex Robert Munson, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Alex Robert Munson
Alex Robert Munson

December 15, 1987

Shirley A. Dye
Shirley A. Dye
Deputy Clerk
High Court of the Trust Territory
of the Pacific Islands
Notary Public pursuant to 5 Trust
Territory Code sec. 356



SF 278 (Rev. [illegible])
FPM Chapter [illegible]
U.S. Office of Personnel Management

Financial Disclosure Report

Form Approved OMB No. [illegible]

Page 1

Reporting Status (Check Appropriate Box)
☐ Incumbent ☒ New Entrant, Nominee, or Candidate ☐ Termination Filer

Agency Use Only:

OGE Use Only:

Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.):

Termination Date (If Applicable) (Month, Day, Year):

Reporting Individual's Name
Last Name: MUNSON
First Name and Middle Initial: ALEX R.

Position for Which Filing
Title of Position: United States District Court Judge Northern Mariana Islands
Department or Agency (If Applicable): Department of Justice

Location of Present Office
Address (Number, Street, City, State and ZIP Code): Trust Territory High Court Capitol Hill, Saipan, CM 96950
Telephone No. (Include Area Code): (011)(670) 322-9739

Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)
Title of Position(s) and Date(s) Held: Chief Justice of the High Court of the Trust Territory of the Pacific Island; from August 18, 1982 to the present

Presidential Nominees Subject to Senate Confirmation
Name of Congressional Committee Considering Nomination: Judiciary Committee
Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No

Certification
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.
Signature of Reporting Individual: Alex Robert Munson
Date (Month, Day, Year): December 15, 1987

Other Review (If desired by agency)
Signature of Other Reviewer:
Date (Month, Day, Year):

Agency Ethics Official's Opinion
The information contained in this report discloses no conflict of interest under applicable laws and regulations.
Signature of Designated Agency Ethics Official/Reviewing Official:
Date (Month, Day, Year):

Office of Government Ethics Use Only
Signature:
Date (Month, Day, Year):

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if comments are continued on the reverse side) ☐

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I** (Liabilities)—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II** (Agreements and Arrangements)—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

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278-106

NSN 7540-01-070-8444

APPENDIX B

SF 278 (Rev. 1/83)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. [illegible]

Reporting Individual's Name				
ALEX R. MUNSON	Assets and Income	Page Number	2	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

		BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets							BLOCK C Income																	BLOCK D Transactions Test	
		Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)							Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)								Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Sch. B Part I for these assets including those sold for a loss.	
	S or DC		None (or less than $1,001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
Examples		XYZ Common				x				x									x								x	
		Doe Jones & Smith, Hometown, USA			x											ptnrshp income									$50,000			
1		Bank of Hawaii (Saipan)	X									X					X											
2		California First Bank (Saipan)			X							X							X									
3		Merrill Lynch Mutual Funds Capitol Fund Inc.					X			X		X								X								
4		Merrill Lynch Mutual Funds Pacific Fund Inc.				X				X		X								X								
5		Merrill Lynch Mutual Funds 2 IRA Accts.			X					X		X						X										
6	S	Kathleen Munson (Teacher)	X																X									
7																												
8																												
9																												
10																												

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278-200

APPENDIX B

SF 278 (Rev. 1/84)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. [illegible]

Reporting Individual's Name: ALEX R. MUNSON

Page Number	3	Schedule B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☐

S or DC		Identification of Assets	Type of Transaction (X)				Amount of Transaction (X)					
			Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000
	Example	X Y Z Common	x			2/1/83			x			
	1	N/A										
	2											
	3											
	4											
	5											
	6											

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. Exclude transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), exclude gifts from relatives and exclude gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☐

S		Source (Name and Address)	Brief Description	Value
	Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/83	$500
		Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
	1	N/A		
	2			
	3			
	4			
	5			
	6			

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278-100

APPENDIX B

SF 278 (Rev. 1/81)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. [illegible]

Page Number	4	Schedule C

Reporting Individual's Name

ALEX R. MUNSON

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☒

	Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC Examples	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	25 yrs			X		
	John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1										
2										
3										
4										
5										
6										

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☒

	Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Hometown, USA	7/75 ptnership agmt.

278-100

PREVIOUS EDITION USABLE

SF 278 (Rev. 1/83)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. [illegible]

Reporting Individual's Name
ALEX R. MUNSON

Page Number	5	Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☒

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/82	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/76	11/83

Part II
Compensation In Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☒

	Source (Name and Address)	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, USA	Legal services
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction

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278-108

APPENDIX B

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	14	000	00
U.S. Government securities—add schedule			
Listed securities—add schedule	92	000	00
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends	25	000	00
Due from others			
Doubtful			
Real estate owned—add schedule			
Real estate mortgages receivable			
Autos and other personal property	50	000	00
Cash value—life insurance			
Other assets—itemize:			
Merrill Lynch IRA	10	000	00
Cash value of retirement	25	000	00
Total assets	216	000	00

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured			
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule			
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	0	000	00
Net worth	216	000	00
Total liabilities and net worth	216	000	00

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor	None		
On leases or contracts	None		
Legal Claims	None		
Provision for Federal Income Tax	None		
Other special debt	None		

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	No		
Are you defendant in any suits or legal actions?	No		
Have you ever taken bankruptcy?	No		

LISTED SECURITIES

Mutual Funds:

Merrill Lynch Capitol Fund Inc. ---------	$66,000.00
Merrill Lynch Pacific Fund Inc. ---------	26,000.00

APPENDIX C

AMERICAN BAR ASSOCIATION

Standing Committee on Federal Judiciary
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CHAIRMAN
Harold R. Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112
FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101
SECOND CIRCUIT
William E. Willis
125 Broad Street
New York, NY 10004
THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103
FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510
FIFTH CIRCUIT
Lloyd Lochridge
Suite 1300
919 Congress Avenue
Austin, TX 78701
SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215
SEVENTH CIRCUIT
Joan M. Hall
Suite 4300
One IBM Plaza
Chicago, IL 60611
EIGHTH CIRCUIT
James W. Hewitt
Post Office Box 80268
1815 Y Street
Lincoln, NE 68501
NINTH CIRCUIT
J. David Andrews
1900 Washington Building
Seattle, WA 98101
Samuel L. Williams
45th Floor
355 South Grand Avenue
Los Angeles, CA 90071
TENTH CIRCUIT
James A. Clark
Suite 1900
303 East 17th Avenue
Denver, CO 80203
ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Post Office Box 78
2 Dexter Avenue
Montgomery, AL 36101
DISTRICT OF COLUMBIA CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 I Street, NW
Washington, DC 20006
FEDERAL CIRCUIT
John D. Lane
Suite 600
1666 K Street, NW
Washington, DC 20006
BOARD OF GOVERNORS LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028
STAFF LIAISON
Irene R. Emsellem
2nd Floor, South Lobby
1800 M Street, NW
Washington, DC 20036
(202) 331-2210
ABA/NET: ABA 461

April 28, 1988

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: ALEX R. MUNSON
United States District Court
for the District of the
Northern Mariana Islands

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Alex R. Munson for appointment as Judge of the United States District Court for the District of the Northern Mariana Islands.

A substantial majority of our Committee is of the opinion that Judge Munson is "Well Qualified" for this appointment. The minority found him to be Qualified.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

HIGH COURT
OF THE
TRUST TERRITORY OF THE PACIFIC ISLANDS
SAIPAN, CM 96950
PH: 322-9739
HL: 306

ALEX R. MUNSON
CHIEF JUSTICE
RICHARD I. MIYAMOTO
ASSOCIATE JUSTICE

September 12, 1988

The Honorable Paul Simon
United States Senator
Care of Judiciary Committee
Room SD-224
Dirksen Senate Office Building
Washington, D.C. 20520

Dear Senator Simon:

I acknowledge receipt and thank you for your letter of September 8, 1988. Accompanying this letter, please find answers to the written questions to supplement the record of the hearing held on August 10 by the Senate Judiciary Committee on my nomination to be the United States District Judge for the Northern Mariana Islands.

If you need any further information, please do not hesitate to contact me at either the High Court, 011 (670) 322-9739, or at my residence, 011 (670) 322-9321 at any time. Please note that Saipan is 14 hours ahead of Washington, D.C. time, i.e., 5:00 p.m. Monday in Washington is 7:00 a.m. Tuesday in Saipan.

Thank you for your continued help and support in this matter. I remain

Most sincerely yours,

Alex R. Munson
Alex R. Munson

TTPI FAX NO. 011 670 322-3203

If called to testify, I, **ALEX R. MUNSON**, could and would competently testify as follows:

1. Please describe briefly your experience in presiding at the actual trial of cases within the jurisdiction of (a) the trial division of the High Court of the Trust Territory, and (b) any other court in which you have been appointed to try cases. Please identify any cases you tried in which your rulings or judgment were overturned on appeal.

(a) I have presided over the entire trial of approximately 80 court cases in the trial division of the High Court of the Trust Territory. As trial judge for those cases, I conducted pre-trial hearings on motions, chamber conferences to set discovery schedules, trial dates, discuss alternate dispute resolutions and have conducted settlement conferences. I have also handled any post trial matters concerning the above referred to cases. During the actual trial of the cases, I ruled on all motions, motions in limine, and objections. At the conclusion of the presentation of the evidence in the cases, I prepared written judgments for approximately 50 civil cases.

My best estimate of the number and types of case I heard in the trial division of the High Court are as follows:

Land Ownership Dispute and Property Matters	30
Criminal (discussed below)	20
Breach of Contract	20
Tort and Property Damage	8
Probate	2

Approximately six of my cases from the High Court were appealed and all of them were affirmed. One of my cases was overruled on the appeal of a different Judge's case being reversed. That case was a land dispute case.

(b)(1) I was designated by the Presiding Judge of the United States District Court for the Northern Mariana Islands to conduct two trials. One case was a Dental Malpractice action and one was for Breach of Contract, Unfair Trading Practices and Failure to Comply with Proper Bidding and Awarding of Government Contracts. I handled all aspects of the cases in preparation of trial. Both cases were settled and dismissed.

(b)(2) I was designated by the Chief Judge of the Commonwealth Court of the Northern Mariana Islands to hear two cases. One case was a property dispute among a brother and a sister. The case was tried to a jury of six; I conducted hearings on motions in limine, motions during the trial, ruled on the admissibility of all evidence, and instructed the jury.

The jury found for the defendant. The case was appealed and was reversed and remanded because on the defendant's motion, I instructed the jury to disregard the testimony of one witness as I felt the testimony related to a matter of law for the judge to rule upon and not a question of fact for the jury. The evidence in question was whether a document written in the Chamorro language was a will or a deed. The appellate court stated that the jury should have been allowed to consider the document for the limited purpose of corroborating a 1970 sales transaction. Since the ruling by the appellate division, I am most careful to have counsel state on the record exactly what the evidence is being offered for.

The other case I handled for the Commonwealth Court was the Manglona case which I testified to at great length before the Committee on August 10.

2. What experience have you had, either as an attorney or a judge, in the trial of criminal matters?

During my last year at Loyola Law School, I was enrolled in a clinical program for criminal law. During the second semester, I was assigned to the Los Angeles County District Attorney's office wherein I conducted preliminary hearings for felony cases and represented the State in the prosecution of 11 entire misdemeanor jury trials. The prosecutions were for drunk driving, theft, assault and battery, and hunting without a license.

As a judge, I estimate that I have presided over the trial of 20 criminal matters. The cases were all misdemeanor matters and all were tried in the State of Kosrae of the Federated States of Micronesia. That court was the only court that the High Court had jurisdiction of criminal matters when I came to Micronesia. All cases were tried without a jury pursuant to the Trust Territory Code.

In addition to the above, I have attended the National Judicial College in Reno, Nevada wherein mock criminal trials were conducted and all the participants (Judges) acted as judges, prosecutors and defense counsel. I also attended an orientation for New Federal Judges and nominees in June, 1988 which included the following topics related to criminal trials:

A sentencing workshop using the United States Sentencing Commission Guidelines Manual

Rules of Criminal Procedure for the United States District Courts

Criminal Pretrial, Trial and Post Trial Proceedings

Recurring Problems in Criminal Cases

The Federal Rules of Evidence

Finally, I have studied and reviewed all the material sent to me by the Federal Judicial Center including:

The Bench Book for United States District Court Judges

Manual on Recurring Problems in Criminal Trials

Compendium of the Law on Prisoner's Rights

Pattern Criminal Jury Instructions

3. Is there a unified bar association for the Northern Mariana Islands? If so, are you a member of this bar? If not, why not?

Yes, there is a unified bar association for the Northern Mariana Islands. I am not a member of that bar because I came to Micronesia as a Judge and as a judge, I cannot practice law. There are no special provisions in the bar association's admission policies to admit judges, law professors or anyone else without taking the bar examination. However, I have performed public service to the bar association, and thus the community, normally expected of members to bear their portion of responsibility by sitting as the chief judge on diciplinary panels for the Diciplinary Committee of the Bar Association. (Please see Appendix A to Questions for Judicial Nominees). I have also attended all Annual Bar Association meetings and functions to which I have been invited in the past six years. Further, I have conducted seminars for the National Institute for Trial Advocay for lawyers in the Northern Mariana Islands. It is my intention to conduct other seminars for the Institute on a regular basis.

4. Please describe how you have expended funds under your control in your current judicial position for the following purposes, and explain the authority on which you relied for determining that these expenditures were proper and reasonable items to be defrayed from the court's budget:

(a) repairing and maintaining your personal residence

As Chief Justice of the High Court, I am provided with housing and utilities. The Executive Branch of the Trust Territory Government performs all repair and maintenance to my residence. The only costs expended from the High Court budget for my residence are as follows:

1. $125.00 to repair the hinges on 34 screens of the house that hold storm boards and to repaint the frames. We live in a typhoon belt and if storm boards are not put up, the house floods. On two occasions, we had over 12

inches of water throughout our house. The Trust Territory Government is phasing out and the Director of Property and Supply said he had no money for the supplies and that if the High Court would provide the supplies, he would provide the labor. As I write this letter, typhoon Hal is raging with winds predicted up to 140 miles per hour.

2. $500.00 to paint the roof of my residence with sun reflective paint. The average monthly electric bill for my residence was $400.00 prior to painting the roof. There is a power shortage in the Northern Mariana Islands and we experience many blackouts. The Governor publically requested that all people take all steps necessary to conserve power. Saipan is in the tropics with average daily temperature in the mid and high 80's. The humidity is usually in the high 80's and 90's, and therefore air conditioning is essential. By painting the roof, the power bill decreased by about one quarter resulting in a savings to the court of about $100.00 a month. The expenditures for the above came from the non-personnel budgeted funds specifically, from utilities which I determined were proper and reasonable to reduce the court's cost, comply with the Governor's request, and protect government property.

I have paid from my own funds to have our house repainted ($750.00), have a car port built ($185.00), installation of air conditioners ($400.00), installation of mini blinds, draps and curtains ($600.00), and every other cost of repair and maintenance not provided by the Trust Territory Government, Executive Branch.

(b) use of power generators acquired with court funds

The court's generator is stored at my residence because the building that houses the High Court has been gradually turned over to the Commonwealth of the Northern Mariana Islands Government to the point that the court now consists of three small offices. I have given the courtroom and all of our storage space to the Marianas Public Land Corporation for their offices. (The Director of Marianas Public Land Corporation is Jesus Villagomez, 011 (670) 322-6914). We have retained a use right for the courtroom when necessary. When we have a blackout, the generator is taken to the court. I have used the generator at night and on weekends during blackouts to run our refrigerator and freezer as we must shop in Guam, 110 miles away by air, and store frozen food in large quantities. If the freezer is not powered for six or eight hours, the food will spoil.

Because my utilities are provided, I have felt that it was reasonable to use the generator for the above purpose. I have paid for all gas and oil to use the generator when I use it.

(c) entertainment functions at your personal residence

I have hosted many receptions at my residence for visiting judges on the United States Judicial Committee of the Pacific and for designated judges that sit on our appellate panel. I was told by the Assistant Secretary of Territorial and International Affairs, Pedro Sanjuan when I interviewed for my present position that part of my duties as Chief Justice was to host such receptions and that the court would pay for them out of non-personnel funds. If a reception was small (10-20 people), I paid the costs. If, however, a large reception was held (more than 20 people), the court hosted it. I estimate that the court has hosted four such receptions in six years.

I, Alex R. Munson, swear and affirm under the pains and penalties of perjury that the information in this statement is, to the best of my knowledge, true and accurate.

Dated this 12th day of September, 1988

Alex R. Munson
Alex R. Munson

Subscribed and sworn to before me
this 12th day of September, 1988.

Sanae N. Shmull
Sanae N. Shmull
Deputy Clerk/Notary Public
Trust Territory High Court
Saipan, MP 96950

CONFIRMATION HEARING ON: RICHARD L. NYGAARD, D. BROOKS SMITH, JAY C. WALDMAN, AND ROBERT L. JORDAN

TUESDAY, OCTOBER 4, 1988

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:07 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr., (chairman of the committee) presiding.

Also present: Senators Leahy, Heflin, Thurmond, Hatch, and Specter.

OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR.

The Chairman. The hearing will come to order.

Let me begin by thanking Senator Leahy for allowing me to sit in the middle chair again. He has been Chair of this ad hoc committee responsible for holding hearings and making important judgments for such a long time. I am grateful that he has allowed me to sit in his stead for these hearings.

Let me say at the outset, I know the press is here in part, the local press—"local" meaning the press from the States of the prospective nominees—are here. But I also know that some of the press is here because they are wondering about what is going to happen to judicial nominations between now and the end of this session when we adjourn sine die. I have been here 16 years. I know I should not even guess. As Congressman Quillen knows better than any of us in this room, you should never guess when we are going to get out of here. But my guess is we are going to be out of here by the end of this week, by Saturday, probably. So there is a lot of concern and wonder about the judges that are on the calendar and what is going to happen.

This will be our only day of hearings. There will be no more hearings held by the Judiciary Committee on prospective nominees, in large part because after thoroughly reviewing the record relating to all of the prospective nominees, and having long and fruitful discussions with the majority leader, the minority leader, Senator Dole, the ranking member of this committee, Senator Thurmond—still my chairman—and other interested parties, we concluded that these judges were the ones that we could most quickly have the hearings on, responsibly have the hearings on in this short amount of time. And there will be a full complement of judges, depending on the outcome of these hearings, somewhere around ten or more that we will be voting on in committee on Wednesday.

In order to facilitate the prospect of the women and men who are on the agenda having an opportunity to be voted on on the floor of the Senate and having an opportunity to become Federal judges, I have agreed to move the executive committee meeting—that is, the meeting at which we make final judgments, I say to the prospective nominees, in this committee as to whether we are, as they say, for you or "agin" you, when we actually vote. And if you are favorably voted upon, you will be sent to the floor of the U.S. Senate immediately.

In order to again facilitate the prospects of those who pass muster of serving on the bench, irrespective of the fact that there is an election under way, irrespective of the fact that it would be very easy to see to it that not a single other nominee was considered, and very easy to see to it that not another judge were appointed in this administration, I made a commitment early on that qualified judges and qualified legislation would move out of this committee and qualified nominees.

That is not to say that any of the people who remain on the docket are not qualified. It is to say that there is no reasonable prospect of being able to get them up, have the hearings, and have the matter voted on on the floor because of either serious bones of contention among our colleagues or serious problems relating to the nominees.

We will have an executive committee hearing, which is slightly unusual, tomorrow, Wednesday, at two o'clock in order to vote upon not only the nominees who have gone through the hearing process and we have put on the docket, but also the nominees who we will hear from today. That will give us time, if they are favorably reported to the floor, to be reported to the floor and for us to on the floor vote as the full Senate on the matter.

One other housekeeping matter before I make a brief, more formal opening statement, is that it has been my practice, at least—and I believe it has been Senator Leahy's practice and the minority when they were in the majority—that notwithstanding the order of nominees that we have before us—and we will hear them in the order that they are listed, the nominees—that especially in the last week of the session our colleagues from the House and the Senate have equally as busy, if not busier schedules than we who sit on this committee.

So in order to accommodate their schedules, any Senator or Congressperson that is in the room at the start of this hearing, we will hear from them first, notwithstanding the fact that the nominee for whom they are speaking may not be heard from for another hour or two or three or longer down the road. Between witnesses, between nominees, if Congresspersons come in in the meantime, we will hear from that Congressperson prior to going to the next nominee.

This is an incredibly busy time for all of us in this body, and if we are going to get out anywhere near Saturday, we are going to attempt to accommodate everyone's schedule that way.

I have a very brief statement. I would just like to indicate to you this morning that the Judiciary Committee is now holding its hearing on its 85th nominee, over 35 hearings like today. We have on other occasions heard more than one nominee at a single hearing in this Congress to consider nominations to the lower courts. That is not counting the number of times Senators Hatch, Specter, Leahy and I have considered nominees to the Supreme Court. Hopefully, we will not have to do that any time in the near term. I would like to be able to see my children again.

Today, we will hear testimony on the nomination of Richard Nygaard for the Court of Appeals in the Third Circuit. We will also hear testimony on three Federal District Court nominations: Robert Jordan, Chancellor Jordan, for the Eastern District of Tennessee; D. Brooks Smith for the Western District of Pennsylvania; and Jay C. Waldman for the Eastern District of Pennsylvania.

This is the second hearing on the Nygaard nomination. It has been called in order to afford the witnesses an opportunity to testify both in favor and against a nominee.

Parenthetically, I should note that although I have been absent from this body for the last 7 months—and all this has been in the able hands of Senator Leahy—in order to accommodate Mr. Nygaard last time, the meeting was relatively hastily called. And witnesses who wanted to testify did not have an opportunity to testify because of the short notice. This is in part to accommodate that.

As we customarily do, we will hear first, as I said, from the Senators and Congresspersons who wish to introduce the nominees to the committee. Before we begin these introductions, let me note for the record that all the nominees have completed an extensive questionnaire on their qualifications, experience and financial background. The publicly available portions of these questionnaire responses will be printed in the record for this hearing, and also extensive background checks by the FBI.

Mr. Nygaard's questionnaire responses were included in the record in his first hearings.

We will also keep open the record for a limited time—and I mean limited time. We usually keep it open for up to a week or two or more, depending on our time frame. But limited, this means hours or, at most, a day for us to be able to move on these nominees—for additional questions that may be submitted by members of the committee who are unable to be present today.

So I say to any of the nominees in the room if, in fact, at the close of business today you receive a question from a Senator not on this committee, I would encourage you to stay up—as my sons in college say, "pull an all-nighter"—and answer it. It clearly is in your best interest to get it in as quickly as you possibly can.

We will also include those questions and answers in the record and the complete introductory statements of Senators, including any who are unable to attend in person today due to scheduling conflicts that they have.

Now, let me first yield, as is customary, to my colleague on the Republican side, Senator Hatch. Then I know my colleague who really is, as I said, accustomed to chairing these hearings, Senator Leahy, for a brief statement. The briefer we can make them, the quicker we can get on to these nominees.

Senator Hatch.

Senator **Hatch**. Thank you, Mr. Chairman, for holding these hearings. They are important. We need these judgeships, and these appear to be very qualified people, three of whom are from Pennsylvania. We are very appreciative that we are moving ahead on these judgeship nominees.

I really do not want to say anything else. We welcome all of you here. We welcome our colleagues from both the House and the Senate who are here to testify as well. We will look forward to completing these hearings at the earliest possible convenience.

Thank you.

The **Chairman**. Because on occasion I have been referred to as the third Senator from Pennsylvania, I want the record to show it is purely coincidental that three are from Pennsylvania.

Senator **Leahy**. Not at all coincidental, Mr. Chairman. The Senator from Pennsylvania, Mr. Specter, has been very adamant in urging during the past 2 years that we get these through. I think that virtually every time he has urged a hearing or asked this Senator, anyway, to have one, we have arranged to do it. That is partly because of the quality of his elocution and persuasiveness, but also because of the respect, of course, we have for the member in this committee.

Mr. Chairman, you mentioned this is the 35th hearing in this Congress to consider nominations to lower Federal courts. I will not define it as privilege or anything else because I think of all the weekends I have spent lugging these big folders like this up to my farm in Vermont and spent the weekend reading more than I ever wanted to know about judicial nominees from parts of a country other than Vermont.

But I am glad to have had the opportunity, and I just would take a minute or two to make a couple observations on it. Because our actions on judicial nominations in this Congress have been the subject of some controversy, some of which was hyped actually by a couple of the people who are sitting right in this room now, and I think unfairly. Some of it has been, though, by people who have made a very careful study of what we have done. Some who have criticized our work have not taken the time that I have taken and other Senators have taken to review the investigations of judicial nominees, or to question the nominees at hearings, and to make an informed decision on whether a particular nominee should be confirmed.

If they had done these things, I believe they would agree that this committee's review of these nominations has been thorough and exacting but fair. In fact, I would note that every single nominee at hearings I have held here or other Senators have held have come by and told the Senator holding the hearing—whether me or others—afterward how thorough and how fair they felt this committee had been, how thorough and how fair they felt the staff had been in talking with them.

Now, after this week's activities, we are going to process more than 80 percent of the nominations, which is a figure comparable to prior years. But most importantly—and I think this is the legacy we will leave, Mr. Chairman, to the 101st Congress—I think the Judiciary Committee, whether you and I are here or others are here, will actually do their nomination hearings from now on based on what we have done here. Because we have thrown away the rubber stamp that used to characterize the committee's consideration of judicial nominees, something that happened under both Republican and Democratic administrations. But I think that system had reflected poorly on our approach to our constitutional duty to advise and consent to these crucial lifetime appointments. The rubber stamp is no longer there. I do not think it will ever come back.

Now, President Reagan has lost some big ones in the judicial nominations field in this Congress, but he has won far, far more than he has lost. And the American people have won with a Judiciary Committee that approaches its constitutional role in the advise and consent process with new seriousness. I think that puts some of the complaints in perspective.

I think the American people have come out the better by a Judiciary Committee that has rediscovered that part of the Constitution that says that we will advise and consent. And we have done that. And the Federal bench is better for it, and the next President, whoever he might be, will actually be in a better position to appoint judges because he will know that they will have to actually go through a real scrutiny, and that they will have to be the best available to our country.

I would also like to take this opportunity, Mr. Chairman, to acknowledge both your support during this time, and I know some of the calls I got from you this summer I appreciate very, very much on this.

And I also want to acknowledge the hard work of the senior Senator from South Carolina on this. Senator Thurmond has been a constant companion of the Senators who have chaired these hearings in this Congress. He has attended more of these hearings than any other Senator of either party. While he and I have disagreed on some things, I want the record to reflect my admiration for the energy, stamina, and persistence that Senator Thurmond has demonstrated throughout the committee's consideration of judicial nominations in this Congress.

I also will say, Mr. Chairman, I appreciate the opportunity to have taken on this chore. I have always thought that it was because I showed up 5 minutes late to one of the organizational meetings, and you appointed me during that 5 minutes. But I think that what we have done both in this and with the Supreme Court hearings you have chaired, we have made it very clear what the rules will be from now on.

Thank you.

The CHAIRMAN. Thank you very much.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I express my appreciation to you, Mr. Chairman, Senator Biden, for convening these hearings, for coming back and taking over the reins. I express my appreciation to Senator Leahy, who undertook the arduous task of spearheading the judicial review for this committee at that time.

We have a difficult situation for factors which are well known to all, and we will be discussing that tomorrow. So I am going to say no more in the interest of time and moving ahead to get the job done.

The **Chairman**. Thank you very much.

Senator Heflin will be here at 11:30, and Senator Thurmond is not here only because he is at the White House advising the President on his next debate tactic in the next debate he and the President are going to have. You ought to hear those conversations between Senator Thurmond and the President. I have never seen anyone give the President such direct advice as Senator Thurmond does.

Senator **Leahy**. He practices on us, Joe.

The **Chairman**. Including saying on one occasion—and I am sure the President, because he laughed and has told other people. Strom very seriously looked at the President, and he said, "Mr. President, when you get to be my age, you will understand compromise is necessary." [Laughter.]

At any rate, let me invite our three colleagues, Senator Sasser, the senior Senator from Tennessee; the junior Senator from Tennessee and good friend, Al Gore; and the dean of the congressional delegation, James Quillen, from Tennessee. Would you all come forward please? Although your nominee will be third or fourth on the list, I would like to ask you gentlemen how you would like to proceed. I will let you make the judgment who should go first.

Senator **Sasser**. Mr. Chairman, it is my assumption that we will all have a brief statement to make about the nominee; and if it suits the committee, I shall begin and then defer to my colleague, Senator Gore, and then to Congressman Quillen.

The **Chairman**. Please do.

I would like to ask unanimous consent that the introductory comments for Mr. Jordan, Chancellor Jordan, that we make be entered in the record as if given just prior to his being questioned.

STATEMENT OF HON. JAMES R. SASSER, U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator **Sasser**. Mr. Chairman, first let me express my appreciation to you and the distinguished members of your committee for convening these hearings today. I appreciate the opportunity to be here to join with my colleagues in introducing Judge Leon Jordan to this committee.

I am particularly pleased to join with Congressman Quillen and my distinguished colleague, Senator Gore, in support of this nomination.

I might say parenthetically, Mr. Chairman, that Congressman Jimmy Quillen and I have cooperated together through the years in a spirit of bipartisanship on matters of concern to east Tennessee, and I believe that this judicial nomination ranks at the present time as one of the most important issues facing the eastern part of Tennessee.

It is vital that the committee act to fill this vacancy. The docket in the Eastern District of Tennessee is one of the heaviest in the country, and cases often take a year to come to trial there. This seat that is presently vacant has been placed in emergency status by the U.S. Judicial Conference, and filling it will be of great benefit to the people of east Tennessee.

Now, Mr. Chairman, in my judgment, Chancellor Leon Jordan is well qualified to tackle the job of serving as a Federal judge in the eastern district. When he was appointed to the Chancery Court bench in 1980, there was a backlog of 2,200 cases in his court. In addition, the Chancery Courts were stretched to the limits of their capacity. Now, as a result of his hard work, the civil docket is fully current, and the criminal docket is as current as it's possible for criminal dockets to be.

In other words, Mr. Chairman, Chancellor Jordan has the experience and, I submit, the talent to get the eastern district's caseload under control. I believe he will get the job done with the same high level of judicial excellence that he has demonstrated throughout his career.

Leon Jordan is a native of the State of Tennessee. He studied at David Lipscomb College and Tennessee Tech University, then went on to obtain both his undergraduate and law degrees from the University of Tennessee. He has served on the Board of Advisors of the University of Tennessee College of Law.

I might say parenthetically, Mr. Chairman, that Chancellor Jordan and I both started out practicing law in the same law firm in Nashville, TN, some 25 years ago.

In 1980, he was appointed Chancellor of the First Chancery Division. He was elected to a full term in 1982 and re-elected later. In 1985, he was elected presiding judge of the First Judicial District.

He has practiced law and served as a judge in Tennessee for 28 years with distinction. That practice has provided a broad range of legal and trial experience which will be one of the great benefits in his service on the Federal bench. I might say that the lawyers and judges in east Tennessee speak very highly of Leon Jordan's ability and experience.

I have had innumerable recommendations from very distinguished lawyers and judges from all across our State, including members of the Tennessee Supreme Court. All of them have urged the speedy confirmation of Chancellor Leon Jordan.

Now, let me conclude, Mr. Chairman, by referring the committee to a remark that Leon Jordan made recently, a remark, in my judgment, that sums up his judicial philosophy. He was asked about his service on the Chancery Court bench and what had been his guiding star, and this was his response.

He said, and I quote:

> I try, with every case, to remember that even though this case may not have a great amount of money involved or be of great magnitude either in fact or in law, it is still the most important case in the world for the person that is before my court because it is the only one he's got * * *. Most people have only 1 day in court, and I think they ought to leave there feeling that they have been treated fairly and justly.

Well, Mr. Chairman, I think that is exactly the attitude that we need in the Federal judiciary. So I want to thank the committee again for holding this hearing today, to thank you personally, Mr. Chairman, for the opportunity to introduce Judge Jordan, and I urge speedy, positive action on his nomination.

[Statement of Senator Sasser follows:]

News from

Senator Jim Sasser

of Tennessee

(202) 224-3344

STATEMENT BY SENATOR JIM SASSER
SENATE JUDICIARY CONFIRMATION HEARINGS
FOR CHANCELLOR ROBERT JORDAN

MR. CHAIRMAN, I APPRECIATE THE OPPORTUNITY TO BE HERE TODAY TO INTRODUCE JUDGE LEON JORDAN TO THE COMMITTEE.

I AM PARTICULARLY PLEASED TO BE ABLE TO WORK WITH CONGRESSMAN QUILLEN ON THIS NOMINATION.

CONGRESSMAN QUILLEN AND I HAVE WORKED TOGETHER THROUGH THE YEARS IN A SPIRIT OF BIPARTISANSHIP ON MATTERS OF CONCERN TO EAST TENNESSEE AND I BELIEVE THIS NOMINATION RANKS, RIGHT NOW, AS ONE OF THE MOST IMPORTANT ISSUES FACING THAT PART OF OUR STATE.

AND I THINK THE CONGRESSMAN AND I ARE HERE TO TELL YOU THE SAME STORY TODAY. IT IS VITAL THAT THE COMMITTEE ACT TO FILL THIS VACANCY. THE DOCKET IN THE EASTERN DISTRICT OF TENNESSEE IS ONE OF THE HEAVIEST IN THE COUNTRY AND CASES OFTEN TAKE A FULL YEAR TO COME TO TRIAL. THIS SEAT HAS BEEN PLACED IN EMERGENCY STATUS BY THE U.S. JUDICIAL CONFERENCE AND FILLING IT WILL BE OF GREAT BENEFIT TO THE PEOPLE OF EAST TENNESSEE.

LEON JORDAN IS PARTICULARLY WELL QUALIFIED TO TACKLE THE JOB. WHEN HE WAS APPOINTED TO THE CHANCERY BENCH IN 1980, THERE WAS A BACKLOG OF 2,200 CASES IN HIS COURT. IN ADDITION, THE CHANCERY COURTS WERE STRETCHED TO THE LIMITS OF THEIR CAPACITY. NOW, AS A RESULT OF HIS HARD WORK THE CIVIL DOCKET IS FULLY CURRENT AND THE CRIMINAL DOCKET IS AS CURRENT AS POSSIBLE FOR CRIMINAL DOCKETS TO BE.

IN OTHER WORDS, MR. CHAIRMAN, LEON JORDAN HAS THE EXPERIENCE AND THE TALENT TO GET THE EASTERN DISTRICT'S CASELOAD UNDER CONTROL. AND I BELIEVE HE WILL GET THE JOB DONE WITH THE SAME HIGH LEVEL OF JUDICIAL EXCELLENCE HE HAS DEMONSTRATED THROUGHOUT HIS CAREER.

LEON JORDAN IS A TENNESSEE NATIVE. HE STUDIED AT DAVID LIPSCOMB COLLEGE AND TENNESSEE TECH UNIVERSITY, THEN WENT ON TO OBTAIN BOTH HIS UNDERGRADUATE AND LAW DEGREES FROM THE UNIVERSITY OF TENNESSEE. HE HAS SERVED ON THE BOARD OF ADVISORS OF THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW.

IN 1980, HE WAS APPOINTED CHANCELLOR OF THE FIRST CHANCERY DIVISION. HE WAS ELECTED TO A FULL TERM IN 1982, AND RE-ELECTED IN 1982. IN 1986, HE WAS ELECTED PRESIDING JUDGE OF THE FIRST JUDICIAL DISTRICT.

HE HAS PRACTICED LAW AND SERVED AS A JUDGE IN TENNESSEE FOR TWENTY-EIGHT YEARS. THAT PRACTICE HAS PROVIDED A BROAD RANGE OF LEGAL AND TRIAL EXPERIENCE WHICH WILL BE OF GREAT BENEFIT IN HIS SERVICE ON THE FEDERAL BENCH. THE ATTORNEYS AND JUDGES IN EAST TENNESSEE SPEAK HIGHLY OF LEON JORDAN'S ABILITY AND EXPERIENCE.

I HAVE HAD NUMEROUS RECOMMENDATIONS FROM DISTINGUISHED LAWYERS AND JUDGES ACROSS TENNESSEE, INCLUDING MEMBERS OF THE TENNESSEE SUPREME COURT, AND ALL OF THEM HAVE URGED ME TO SUPPORT THIS NOMINATION.

LET ME CONCLUDE BY REFERRING THE COMMITTEE TO A REMARK CHANCELLOR JORDAN MADE RECENTLY, A REMARK THAT, IN MY JUDGMENT, SUMS UP HIS JUDICIAL PHILOSOPHY.

HE SAID: "I TRY, WITH EVERY CASE, TO REMEMBER THAT EVEN THOUGH THIS CASE MAY NOT HAVE A GREAT AMOUNT OF MONEY INVOLVED OR BE OF GREAT MAGNITUDE EITHER IN FACT OR IN LAW, IT STILL IS THE MOST IMPORTANT CASE IN THE WORLD FOR THAT PERSON BECAUSE IT'S THE ONLY ONE HE'S GOT....MOST PEOPLE JUST HAVE ONE DAY IN COURT AND I THINK THEY OUGHT TO FEEL LIKE THEY'VE BEEN TREATED FAIRLY AND JUSTLY."

I BELIEVE THAT IS EXACTLY THE ATTITUDE WE NEED IN THE FEDERAL JUDICIARY.

SO, I COMMEND THE COMMITTEE FOR HOLDING THIS HEARING TODAY AND I THANK YOU, MR. CHAIRMAN, FOR THE OPPORTUNITY TO INTRODUCE JUDGE JORDAN AND I URGE SPEEDY POSITIVE ACTION ON HIS NOMINATION.

# # #

The CHAIRMAN. Mr. Gore?

STATEMENT OF HON. ALBERT GORE, JR., U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator GORE. Mr. Chairman, members of the committee, thank you for this opportunity to testify. I am grateful for the chance to join my senior colleague, Senator Jim Sasser, and my long-time friend, the dean of Tennessee's Congressional Delegation, Congressman Jimmy Quillen, in introducing to the committee a distinguished jurist and fellow Tennessean, Chancellor Leon Jordan. I support his nomination wholeheartedly, and I am hopeful that the Judiciary Committee will ultimately concur with the judgment that Senator Sasser, Congressman Quillen and I are imparting to you this morning.

I will avoid duplicating some of the statements that Senator Sasser has just made, but I do want to say just a bit. Chancellor Jordan served his country early on in his career in the U.S. Army. Then after practicing as an attorney for some 20 years, gaining the experience requisite to a judgeship, he was appointed Chancellor for the First Judicial District of Tennessee. He has served east Tennessee in that capacity since 1980. He is a man of integrity, and I believe him to be well-qualified to serve as a Federal judge. He is respected by his peers, and active in his community as well. In addition to taking leadership positions of service to the community—for example, in the local Kiwanis Club, local Chamber of Commerce—he has also been very active in the bar associations and Trial Lawyers Association.

I, too, was taken with the statement of judicial philosophy which Senator Sasser just quoted to you, and I think we need more people serving on the bench who have that approach and attitude. I think that statement which Senator Sasser quoted to you reflects Leon Jordan's philosophy of public service, a philosophy that should be encouraged and admired. It should be a model. Chancellor Jordan followed that same philosophy when he was working to overcome the backlog that he inherited upon becoming Chancellor in 1980. In other words, he has always shown those in his courtroom the kind of personal attention and consideration which we wish every judge would show.

While Chancellor Jordan and I are of different political persuasions, I support his nomination strongly because he is a man with an open mind, a fair mind, and a compassionate nature. In court, decisions are not made on the basis of ideology, but on the basis of law; not on the basis of party affiliation, but on the basis of justice and fairness.

The vacancy in the Eastern District of Tennessee is one of the oldest in the Nation. We have all been referring to it as the second oldest in the Nation. I was informed by the staff of this committee that it may technically be the oldest in the Nation. There is a very large backlog, and the administration of justice requires filling this vacancy as soon as possible. We are fortunate to have a nominee of this caliber in order to fill that vacancy.

So I ask my colleagues on the committee to do all you can to see that this nomination proceeds as smoothly and quickly as possible.

The people of the Eastern District of Tennessee have endured this vacancy long enough. The backlog has now reached emergency proportions. I urge your approval of this nomination.

The **Chairman**. Thank you.

Congressman Quillen, welcome.

STATEMENT OF HON. JAMES H. QUILLEN, REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. **Quillen**. Mr. Chairman, members of this committee, it is a high honor for me personally to appear before you today in behalf of Leon Jordan.

I want to thank Senators Sasser and Gore for the fine job that they do and for calling attention to the fact that this is an important nomination and should be filled. We work closely together, and I want to thank both of them for their efforts in bringing this nomination to where it is today. It is a pleasure to join hands with them for the common good of my district and for the common good of Tennessee.

I will try to be brief and paraphrase some of the things that have been said. But as a matter of fact, this vacancy has been declared a judicial emergency, and I think it is important that we fill it as soon as possible.

Chancellor Jordan has served for several years as Chancellor of the First Judicial District of Tennessee and has an enviable record. He is outstanding in every way, not only as a judge, but as an individual as well.

In walking over here today through the Rotunda, coming to this meeting, we passed the statue of Andrew Jackson. He reminded me that Andrew Jackson served in the chair that he now serves in, living in Jonesborough, Tennessee, and that he also served as a member of the House living in the district where I live. We all know the reputation of Andrew Jackson and the fine job that he did.

The **Chairman**. Congressman, does this mean we are going to have two presidential candidates from Tennessee next time? [Laughter.]

Mr. **Quillen**. Maybe three or more.

The **Chairman**. Maybe more?

Mr. **Quillen**. I want you to know Leon Jordan, the man: He was born and reared on a farm, one of seven children. He served in our armed forces in Germany during World War II and was selected as an honor soldier.

He is married, and he and his wife, Dottie, who is with him today, have three children. He is active in his church, in his community, and in his profession.

I want you to know Leon Jordan, the lawyer: He was a partner in one of the most highly respected law firms in east Tennessee, starting out in the firm that Senator Sasser was in when they both began to practice their profession. He represented the employee and the employer. He represented the bankrupt and the bank. He represented the individual and the press.

I want you to know Chancellor Jordan, the judge: He was appointed Chancellor in 1980 and inherited a docket with a 2,200 backlog. He organized dockets, published his schedules and held court regularly in the five counties he served until the dockets were current.

He was elected in 1982 by a margin of over 11,000 votes to an 8-year term. His ability has been recognized by his fellow judges of the first judicial district as they elected him presiding judge for two terms.

The judges of Tennessee elected him Secretary of the Tennessee Judicial Conference in 1986–1987, and this year elected him to the executive committee for a 3-year term.

He has received the endorsement of all the area bar associations for his confirmation.

Mr. Chairman, I would like to read portions of an editorial from the August 5, 1988, edition of the *Elizabethton Star.* Elizabethton is in the heart of Chancellor Jordan's first judicial district. The editorial states:

> JORDAN IS GOOD CHOICE
>
> * * * Jordan's nomination comes none too soon as the judgeship has been vacant since the January 1985 resignation of the late Judge Robert L. Taylor. A quick confirmation is needed to dispose of the heavy backlog of cases in the east Tennessee district.
>
> * * * Leon Jordan is a good choice for the Federal judgeship. He has all of the solid qualities to make an excellent Federal judge. He is a man of integrity and highly respected by his peers.

Continuing the quote:

> * * * Having observed the Chancellor at work now for 8 years, we know that he has the excellent moral fiber and the extensive background and experience to make an outstanding Federal judge.
>
> Jordan scores highly with area attorneys for his knowledge of the law, diligence, demeanor and suitability for the bench.

Many other newspapers have editorialized their support for Leon Jordan.

Mr. Chairman, Chancellor Leon Jordan is an excellent choice for the Federal judgeship, and I highly support and recommend him to you to fill the vacancy of Federal Judge, U.S. District Court, Eastern District of Tennessee. I urge you to act favorably on his nomination.

[The résumé of Chancellor Leon Jordan follows:]

RESUME OF CHANCELLOR LEON JORDAN

Full Name: Robert Leon Jordan

Address: 605 Crestview Drive
Johnson City, Tennessee 37601

Date and Place of Birth: June 28, 1934
Woodlawn, Tennessee

Physical Statistics: Height: 6 ft. -- Weight: 198 lbs.
Hair: Gray -- Eyes: Blue

Marital Status: Married in 1956 to Dorothy W. Rueter of Maryville, Tennessee
Mrs. Jordan is employed as a Medical Technologist at the Veterans Administration Hospital, Mountain Home, Tennessee

Number of Children: Three -- Robert; Margaret Anne; and Daniel

Church Membership: Church of Christ -- Sunday School Teacher

Clubs and Organizations: Member, Tennessee Bar Association; Tennessee Judicial Conference (Secretary 1986-1987); Metropolitan Kiwanis Club (Past Presidnet, Director, Kiwanian of the Year 1986-1987); Johnson City-Washington County Area Chamber of Commerce; Johnson County Chamber of Commerce

Former Clubs and Organizations: American Bar Association; Tennessee Trial Lawyers Association; Washington County Bar Association (President-Elect 1980); The University of Tennessee College of Law (Board of Advisors); Rocky Mount Historical Society (Trustee); Parents Without Partners (Professional Advisory Board); Junior Achievement of Pensacola, Inc.; Northwest Florida Crippled Childrens Association (Crippled Childrens Hospital--Director and Treasurer); High Rock Bible Camp (Trustee); Pensacola Kiwanis Club; YMCA; Elks

Military Status: Completed. Honorable Discharge U. S. Army; Foreign Service in Germany 1955-1956; Honor Soldier--Enlisted

Education:

Clarksville High School
Clarksville, Tennessee
Graduated--1952

The University of Tennessee
B.S. in Finance--1958

The University of Tennessee
J.D.--1960

College Activities:

Inter-Collegiate Debate; National Speech Fraternity (Phi Kappa Delta); National Legal Fraternity (Phi Alpha Delta); Secretary-1959 and Vice-President-1960 of The University of Tennessee Bar Association.

Employment History:

1960-1961 - Goodpasture, Carpenter, Dale & Woods, Attorneys at Law, American Trust Building, Nashville, Tennessee

Associate Attorney--General practice, including investigation, research and trial work in lower Courts. Practice limited to civil law.

1962-1964 - Frontier Refining Co., 4040 East Louisiana Avenue, Denver, Colorado, and subsidiaries

Positions: Special Representative; Division Manager; Sales Promotion Manager. Duties consisted of assisting division managers in the operations and sales management of company-owned and operated, and leased gasoline service stations. Later placed in charge of separate discount division, was General Manager of same. Sales Promotion Manager, where duties consisted of planning and organizing sales promotions and sales programs, including product information for company.

1964-1966 - Green & Green, Attorneys at Law, Johnson City, Tennessee

Position: Associate Attorney--General practice of law, with primary emphasis on civil law.

1966-1969 - First Peoples Bank, Johnson City, Tennessee

Position: Trust Officer in charge of Trust Department. Complete management responsibility for all phases of Trust Department.

1969-1971 - The Commercial National Bank of Pensacola, Pensacola, Florida

Position: Vice-President and Trust Officer

-and-

First National Bank of Milton, Milton, Florida

Position: Trust Officer
Head of both Turst Departments, total management responsibility for all phases of trust work.

1971-1980 - Bryant, Price, Brandt, Jordan & Fox, 500 First American Bank Building, 208 Sunset Drive, Johnson City, Tennessee

Partner--general practice of law in state and federal courts.

1980 - Appointed Chancellor of the First Chancery Division (now First Judicial District) of Tennessee by Governor Lamar Alexander

1982 - Elected Chancellor of First Judicial District of Tennessee by a margin of over 11,000 votes

1986-present - Elected Presiding Judge of the First Judicial District of Tennessee by fellow Judges of the District

Opinion

Jordan is good choice

President Reagan has nominated Chancellor Leon Jordan for the vacant federal judgeship in the East Tennessee District.

Jordan's nomination comes none too soon as the judgeship has been vacant since the January 1985 resignation of the late Judge Robert L. Taylor. A quick confirmation is needed to dispose of the heavy backlog of cases in the East Tennessee District.

In fact, the vacancy is the second-oldest federal judgeship vacancy in the country. Reports indicate that since 1984 the pending caseload in East Tennessee rose 45 percent while filings decreased 16 percent.

Leon Jordan is a good choice for the federal judgeship. He has all of the solid qualities to make an excellent federal judge. He is a man of integrity and highly respected by his peers.

Jordan was named a chancellor in 1980, and was elected to the post in 1982. At that time the First Judicial District had a backlog of 2,200 cases, and had a legal system that was experiencing growing pains.

The Montgomery County native was practicing law in Johnson City when he was appointed chancellor, and at that time his jurisdiction included Sullivan County as well as Washington, Unicoi, Johnson and Carter Counties.

Jordan had to pretty much work off the backlog himself, with some assistance from the other judges, but he was able to accomplish it.

The system is in a lot better shape than it was five or eight years ago, and Jordan's participation in that accomplishment is something he can take great pride in.

Having observed the Chancellor at work now for eight years, we know that he has the excellent moral fiber and the extensive background and experience to make an outstanding federal judge.

Jordan scores highly with area attorneys for his knowledge of the law, diligence, demeanor and suitability for the bench.

Jordan has some unique philosophies that he has carried to the bench with him. A deeply religious man, Jordan also tries to remember with every case that he used to be a lawyer, too.

"I try, with every case, to remember that even though this case may not have a great amount of money involved or be of great magnitude either in fact or in law, it still is the most important case in the world for that person because it's the only one he's got. Most people only have one day in court and I think they ought to feel like they've been treated fairly and justly," Jordan told a newspaper reporter once.

To us that sounds like a good man with a good legal doctrine, one that is based on fairness, compassion, and the law.

Certainly, Chancellor Leon Jordan is a great choice for the federal judgeship and we hope for a speedy confirmation of his nomination.

The **Chairman**. Thank you very much, Congressman Quillen, and thank you for coming over to the other body. I know it is a long walk. Obviously, you feel strongly about Chancellor, the fervor of your support, as with both your colleagues, is something that makes an impression on all of us.

Gentlemen, I want to thank you. You are obviously welcome to stay. But we will not get to the Chancellor probably for another 1½ to 2 hours. So I know you have other things to do. Your entire statements will be placed in the record, and I thank you for your time.

Senator **Sasser**. Thank you, Mr. Chairman.

Senator **Gore**. Thank you, Mr. Chairman.

Mr. **Quillen**. Thank you, Mr. Chairman.

Now, we will move to our first nominee, who is having his second hearing. There are two witnesses that wish to testify. One, I should make a disclaimer at the outset, is a friend of mine; we have faught some of the same battles together. And I am glad to see that he took the time to come all the way down to testify on behalf of Judge Nygaard's nomination to the third circuit. That is State Senator Buzz—and I am not sure whether I should call you "Buzz"—Buzz Andrezeski, who is here today to testify on behalf of Judge Nygaard.

Senator, if you would come forward at this time and take the seat here. Buzz is a State Senator from Erie. He has known Judge Nygaard for years and is here to testify on behalf of Judge Nygaard, knowing him as a person as well as his reputation in the community. I would like again to welcome you. I know that Senator Specter is delighted to have you here also.

Senator **Specter**. I am.

The **Chairman**. Without any further ado, why don't you—excuse me. It has been so long since I have been doing this. I have got to swear you in, Senator. Would you please stand?

Do you swear the testimony you are about to give will be the whole truth and nothing but the truth, so help you God?

Mr. **Andrezeski**. I do.

The **Chairman**. Senator, begin in any way that you would like.

TESTIMONY OF HON. ANTHONY "BUZZ" ANDREZESKI, PENNSYLVANIA STATE SENATOR, ERIE, PA

Mr. **Andrezeski**. My name is Anthony "Buzz" Andrezeski. I serve as the State Senator in the 49th District of the State of Pennsylvania. I represent approximately 255,000 people. I was elected in 1980 to that position. I am a Democrat who beat the Democratic incumbent in that year.

Previous to that, I served with Richard Nygaard on Erie County Council, the legislative body that ran Erie County. Richard Nygaard and I worked on projects that affected Erie County and became personal friends. In 1981, I had the honor of introducing Judge Nygaard, nominated Judge Nygaard, to the Pennsylvania Senate Judicial Committee for the Court of Common Pleas. He was appointed to the court by Governor Thornburgh and was approved by the Senate. In 1983, Judge Nygaard was elected by both Democrats and Republicans to a 10-year term on this court.

According to the American Bar Association's Standing Committee on the Federal Judiciary, I quote: "A substantial majority found him qualified to perform satisfactorily based on evidence of his integrity, competence, and temperament."

I would like to address my remarks more as a citizen, more as somebody who works with the judicial system, but I would also preface with the fact I am not a lawyer.

The CHAIRMAN. Stop bragging, Senator. It is not very becoming. [Laughter.]

Mr. ANDREZESKI. In fact, before I was a State Senator, I was a structural iron worker, and Richard Nygaard and I belonged to the AFL-CIO at various times together.

Geographically, the nomination of Richard Nygaard is important to our area. It is a chance to have someone from Erie County appointed to one of the highest courts of the land. It is significant to say that we are proud of him from the great Northwest.

I view Judge Nygaard to be nonpartisan. I have followed him on the bench. I have followed his statements. I have followed his decisions. And it is my personal and professional opinion that Richard Nygaard, Judge Nygaard is nonpartisan. I do not see him having a conservative agenda; I do not see him having a liberal agenda. I do see Judge Nygaard calling the issues as he sees them, with his best judgment.

Judge Nygaard is very good at dealing with laws that exist. I would point out that in State legislatures across America the issue of mandatory sentencing keeps coming up. We have mandatory sentencing for drug dealers. We have mandatory sentencing for people who are convicted of drunk driving. Before we had mandatory sentencing in Pennsylvania, Judge Nygaard was putting people away for the crimes they committed. He did not need a State legislature to create new laws for mandatory sentencing. He was applauded and recognized in Erie County for convicting and sentencing drunk drivers and putting them away and giving them the proper punishment.

Finally, in that statement, I view Judge Nygaard to not be somebody out there looking to create new laws, interpret things in new ways and create further work for legislative bodies on increasing the number of laws needed to deal with situations.

Finally, and I say this as a citizen, as a Senator, as a father of three children, Judge Nygaard is not afraid to sentence wrongdoers. He put people away, and I do not think that gives him any sort of label, either conservative or liberal. I think it gives him a label of being responsible in our community. He has done that. We have worked on civic projects together. I could not more highly recommend anyone for this position.

Thank you, Senator.

The CHAIRMAN. Thank you, Senator, for taking the time to come down.

I have one question that you may be able to shed some light on. As a State Senator, had it been called to your attention while Judge Nygaard was serving in the State court system that he did not follow the State sentencing guidelines, that he had acted arbitrarily in dealing with the State sentencing guidelines—before you answer, as I understand it, the State of Pennsylvania, as a consequent of legislative action and, I assume, governor's consent, or overriding the governor's veto—I do not know how it came about—has certain sentencing guidelines. One of the questions raised that will be explored this morning about Judge Nygaard is whether or not he had acted arbitrarily in his sentencing decisions.

As the State Senator from the district in which Judge Nygaard was acting as a State judge, had you received complaints or had it been called to your attention, or had anyone raised the issue of whether Judge Nygaard had acted arbitrarily in moving beyond or around the State sentencing guidelines?

Mr. ANDREZESKI. The only complaints that I had were from the families of people he had sentenced. The only specific complaint was he had sentenced an individual to a very long term in prison for being the leader of a gang that brutally raped two women. And it was one of the most brutal rapes that ever happened. It was a gang rape upon two women, and he sentenced them to a very long term in prison. The family was very upset that he did that.

It was a long sentence. The whole community agreed with Judge Nygaard that they deserved it. And I applauded him for doing that. I have children. I would not want that to happen to my children.

On the sentencing guidelines, we had sentencing guidelines in Pennsylvania, and they were thrown out at one time. They were overturned by some decision. Then we had another process of initiating the sentencing guidelines in Pennsylvania. One of our problems is that we have some disagreements between the judiciary and the legislative branch in Pennsylvania. In fact, the Supreme Court of Pennsylvania just took two people off the ballot running for higher court. In terms of sentencing guidelines, there is issue to be made that you can deviate from sentencing guidelines. When we passed the sentencing guidelines in Pennsylvania, for reason given, you can deviate from the guidelines. So there is a process for somebody to go outside of the sentencing guidelines within the context of those sentencing guidelines.

The CHAIRMAN. So you can deviate from the sentencing guidelines, I assume, if you give reason for the deviation. Is that what you are pointing out?

Mr. ANDREZESKI. Yes.

The CHAIRMAN. All right. I do not have any further questions. I will yield to my colleagues.

I want to thank you again for making the trip, and also on a personal note, thank you for everything you have done for me.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, I do not think I have any particular questions.

I understand you are a Democratic State Senator in Pennsylvania.

Mr. ANDREZESKI. Yes, sir.

Senator THURMOND. You come here to endorse this candidate to be a judge on the Third Circuit Court of Appeals.

Mr. ANDREZESKI. Yes, Senator.

Senator THURMOND. As far as you know, he is a man of good character, a man of ability, a man of dedication, and you recommend that we approve him. Is that correct?

Mr. ANDREZESKI. I could not personally recommend anyone for this position with higher regard, with higher integrity.

Senator THURMOND. Thank you very much.

The CHAIRMAN. There was one negative thing he did say, though, Strom, you should realize. He did point out that Judge Nygaard at one time was a member of the AFL-CIO. I just want you to know that.

Senator THURMOND. Well, I imagine he has departed from that now. [Laughter.]

The CHAIRMAN. Senator Leahy.

Senator LEAHY. I missed part of your testimony, but did you go into at all the question where the courts have expressed concern that Judge Nygaard has not applied State sentencing statutes?

Mr. ANDREZESKI. Yes, I did. In brief, I said that we have sentencing guidelines in Pennsylvania that have been overturned, that have been reintroduced. In the sentencing guidelines themselves, there is a process for going outside of the sentencing guidelines with a proper procedure or set of reasons for doing that. In fact, I follow the sentencing guidelines, the sentencing reports in my county, and it is not something that is rarely done. In many instances in my experience, people have gone outside the sentencing guidelines, and there is a procedure for doing that.

Senator LEAHY. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Senator Andrezeski, I thank you for coming to Washington and showing your support for Judge Nygaard.

My question for you relates to the standing of Judge Nygaard in the community, on an evaluation of his relative standing with other Common Pleas judges, and with other members of the legal profession, in terms, as you and I know and the members of this panel know and as it is generally known, that there is an effort to have a geographical distribution in our selection of Federal court judges, including the Court of Appeals, to have some balance and to have some diversity of representation.

I had personally urged Judge Nygaard to become a candidate for the Federal bench early on, and in reviewing those who aspire to the Federal bench from Erie in terms of interest and qualification—and I am not a member of the Erie County Bar, but I have spent considerable time in Erie and have some appreciation of the factors on judicial selection. Based upon all the factors that I determined, Judge Nygaard was the preeminent candidate from Erie County. You, of course, are a resident there and know the community well. And I would ask if that corresponds to your assessment of the situation there.

Mr. ANDREZESKI. Yes, Senator, it does. It does correspond to my assessment. Judge Nygaard is very highly regarded in the community. He has not become a judge and disappeared from the community. He has still participated; in fact, Judge Nygaard and I worked at the Gertrude Barber Center on projects together, which is a world-renowned center for mentally retarded children and adults. He still remained active.

Finally, Senator, I think that something should be said. Judge Nygaard wants to serve. He wants to be on this court, on this bench. And I think that that says something; that he shows a willingness to say: I can do this and I can go this far. And I think that is part of the whole process in having an effective judiciary, is having the people who do not want to retire to a position, but more importantly want to work up to a position as part of a career ladder.

Senator SPECTER. So would it be your testimony that based on your knowledge of the community and the professional qualifications and interests of those who might aspire to the Federal bench, including the third circuit, that Judge Nygaard would be the preeminent candidate from your region?

Mr. ANDREZESKI. In my opinion, Senator, Judge Nygaard is the preeminent candidate, the most qualified candidate to represent us in western Pennsylvania.

Senator SPECTER. Thank you very much, Senator.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator, I want to thank you again for taking the time. Your opinion is highly regarded here. We thank you for coming and appreciate it very much.

Mr. ANDREZESKI. Thank you, Senator.

The CHAIRMAN. Our next witness relating to Judge Nygaard is Nan Aron. Ms. Aron will testify on behalf of the Judicial Selection Project of the Alliance for Justice, a coalition of civil rights, labor and public interest organizations.

Welcome. Ms. Aron, will you identify your colleague for the record?

TESTIMONY OF NAN ARON, ALLIANCE FOR JUSTICE, WASHINGTON, DC, ACCOMPANIED BY GEORGE KASSOUF, DIRECTOR, JUDICIAL SELECTION PROJECT

Ms. ARON. Thank you.

With me is George Kassouf, who is the director of the Alliance's Judicial Selection Project. He has also reviewed Judge Nygaard's record and will be happy to answer questions along with me.

The CHAIRMAN. Before either of you do go any further, would you please stand and be sworn?

Do you both swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. ARON. I do.

Mr. KASSOUF. I do.

The CHAIRMAN. Please proceed.

Ms. ARON. The Judicial Selection Project is a coalition of lawyers, academics, and representatives of civil rights, labor and public interest organizations that was formed in January of 1985 to monitor appointments to the Federal bench. The Project reviews the backgrounds of all judicial nominees and considers such issues as fairness, judicial temperament of a nominee, and basic qualifications.

We are here today to discuss the qualifications of Judge Nygaard who has been nominated to the third circuit. Many of the Senators here today have spoken in the past about the qualifications of an appellate judge. Senator Biden and Senator Leahy have said that nominees should possess strong legal skills and a solid base of legal experience and training. Judge Specter—excuse me, Senator Specter on occasion has talked about the need——

Senator SPECTER. Thank you.

Senator LEAHY. We will move that right to the top of the agenda, Arlen. [Laughter.]

Ms. ARON [continuing]. The need for the Senate to apply high standards and qualifications. On the basis of reviewing Richard Nygaard's record, his litigation experience, his academic credentials, speeches and case opinions, the Project concludes that he does not measure up to the high standards required for an appellate judge.

It is not evident from his legal and judicial experience that Judge Nygaard has shown true distinction in the law, and he has not met the burden of showing that he merits a lifetime post on the Federal Bench.

Judge Nygaard is a State court judge on the Court of Common Pleas in Erie County, Pennsylvania. He was appointed in 1981 and ran unopposed in 1983. Prior to serving as a State trial court judge, Judge Nygaard practiced law for 10 years in the town of North East, PA, where his law practice was of a general nature.

The ABA Standing Committee on the Federal Judiciary, which routinely rates Federal judicial nominees, gave Judge Nygaard the lowest qualified approval rating—a split rating of qualified and not qualified, clearly below the available superior ratings.

Prior to his appointment to the State trial court, Richard Nygaard practiced law for 10 years, and in his own words, in his questionnaire, had cases which "included only minor matters of litigation, such as domestic relations, counseling, estate planning and probate issues." According to Judge Nygaard, "I appeared in court only infrequently."

With regard to Federal litigation experience, he does not include a single Federal case in listing his most significant litigated matters, as requested in the questionnaire. In fact, he states, "It is hard to find any ten cases which I would consider to be significant." He lists only six cases, and those listed do not contain any Constitutional or complex statutory issue. Moreover, he has never argued a case before the third circuit, the court to which he has been nominated.

Judge Nygaard now sits on a county court, and for the past 3 years, has been the judge for the Orphans Court, in which he heard routine, uncontested guardianship/adoption matters. In his 7 years on the State bench, Judge Nygaard has heard few cases involving Federal constitutional issues. On his Senate questionnaire, he lists only two of these cases.

One of the best measures of Judge Nygaard's opinions can be seen in the number of reversals of these opinions by the appellate courts, particularly looking at the wording of these appellate courts. Many have sharply criticized Judge Nygaard about the quality of his judicial decisionmaking, specifically noting a lack of legal reasoning, and some have maintained he has overstepped his authority. I will not describe all the cases, but highlight only some of those cases for you today.

In one case, *Commonwealth* v. *Krysiak,* Judge Nygaard sentenced the defendant to a minimum of 17½ years and a maximum of 35 years. The Superior Court vacated the sentence, finding that Judge Nygaard failed to adequately state the reasons for the sentence. And I quote from the court's opinion: "In the present case, reversible error is apparent on the record. Upon this record, we conclude that the lower court's remarks regarding its reasons for sentencing are of such brevity and conclusory quality that they do not manifest a consideration of the statutory guidelines for sentencing, nor otherwise explain the reasoning behind the sentence imposed."

At his first hearing before this committee, Senator Simon asked Judge Nygaard about this case and about the sentencing guidelines. Judge Nygaard assured this committee that since *Krysiak,* he has made his colloquy with the defendant more extensive. However, a year later, Judge Nygaard was criticized again for his inadequate sentencing methods. In *Commonwealth* v. *Lord,* Cheryl Lord, a mother of four living on public assistance, pled guilty to driving under the influence of alcohol and driving without a license. Among other things, Judge Nygaard imposed a fine of $1,000 on her. The Superior Court reversed the imposition of the fine. According to the sentencing code, a defendant shall not be fined unless it appears that the defendant is or will be able to pay the fine. Further, according to the sentencing guidelines, the sentencing court must consider "the financial resources of the defendant and the nature of the burden that its payment will impose."

After quoting these provisions, the Superior Court stated that Judge Nygaard did not follow the mandate of the statute. I quote from the opinion: "We have reviewed the four pages of the verbatim sentencing transcript of February 3rd. There is nothing on the record to support a conclusion that the defendant will be able to pay a $1,000 fine. Nor does it appear that the sentencing court took into account the financial resources of the defendant and the nature of the burden that payment of the fine would impose."

In a third sentencing case, *Commonwealth* v. *Kunselman,* Judge Nygaard sentenced the defendant, who was guilty of vehicular homicide, to a minimum sentence of less than 3 years and a maximum sentence of 3 years, thus allowing the defendant to serve between zero and 3 years in length. The Motor Vehicle Code, however, required a term of no less than 3 years. In imposing the sentence, Judge Nygaard also stated that the parole board would be forced by the code to ensure that the full 3-year sentence was served.

The Superior Court reversed Judge Nygaard again, holding that he had failed to follow the mandatory sentencing provisions and that he was usurping the power of the parole board. And I quote: "The lower court shows a disregard for the legislative mandate and a misconception of his authority and the power and responsibility of the parole board."

Perhaps the best known case of Judge Nygaard concerns a former chief of police of Erie County, Mr. Gemelli, who was indicted on 28 counts of theft. It was alleged that the former police chief removed arms from the police evidence room, sold the arms at a profit, and kept the profits and then engaged in a cover-up when he became aware that he was under some scrutiny.

Judge Nygaard quashed the indictment on the grounds that the charges should have been brought under the Escheat Law and that the infractions were de minimis because he believed the weapons were valueless.

In reversing Judge Nygaard's opinion, the Superior Court stated: "We perceive absolutely no basis for dismissing such serious allegations as merely de minimis infractions. This is especially true in light of our holding supra that the issue of the application of the Escheat Law has been waived."

There are other cases that we could go into in great detail. There is just one last one I will mention, and the rest can be found in our testimony, and that case is *Commonwealth* v. *Markley.* It is not a sentencing case.

In *Commonwealth* v. *Markley,* the defendant petitioned the court for a hearing under the Post-Conviction Hearing Act, alleging violation of his appeal rights and ineffective assistance of counsel. Judge Nygaard dismissed the petition on grounds of mootness because the defendant had served the sentence. The Superior Court reversed on appeal, observing that both United States and Pennsylvania Supreme Court precedent on the issue was controlling. The court says that Judge Nygaard's attention to these matters was clearly wrong.

Obviously, trial court judges are reversed all the time. That is not what is at issue in this particular case. Judge Nygaard's reversals reveal a consistent major problem in the quality of his judicial decisionmaking. He has been chastised for rendering decisions which are arbitrary and lack thoroughness in analysis. He takes short-cuts to render judgments instead of thinking through the issue.

Finally, it is rather striking to compare Richard Nygaard's qualifications with those of Joseph Weis, the individual whom he will replace if he is confirmed. Joseph Weis was appointed by President Nixon in 1973. At the time of Judge Weis' appointment, he was a Federal District Court judge in the Western District of Pennsylvania and had 31 cases published in the Federal Reporters in his 3 years on that bench.

The caliber and experience level of the other third circuit nominees is equally high. The same cannot be said of Richard Nygaard, at least not at this point. We believe he is not qualified to serve on the Federal Court of Appeals and determine questions of complex, constitutional and statutory importance.

We appreciate the opportunity to come before you and will respond to any questions you may have.

[Statement follows:]

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Women's Legal Defense Fund

BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

TESTIMONY
OF
THE ALLIANCE FOR JUSTICE'S
JUDICIAL SELECTION PROJECT
ON THE NOMINATION OF
RICHARD NYGAARD
TO THE THIRD CIRCUIT COURT OF APPEALS

October 4, 1988

Participating Alliance Members: Business and Professional People for the Public Interest; Center for Law and Social Policy; Center for Law in the Public Interest; Center for Public Representation; Center for Science in the Public Interest; Education Law Center; Employment Law Center; Equal Rights Advocates; Food Research and Action Center; Institute for Public Representation; Juvenile Law Center of Philadelphia; Mental Health Law Project; National Education Association; NOW Legal Defense and Education Fund; National Women's Law Center; Native American Rights Fund; New York Lawyers for the Public Interest; Public Advocates, Inc.; Sierra Club Legal Defense Fund; Women's Law Project; Women's Legal Defense Fund

I. INTRODUCTION

My name is Nan Aron, and I am the executive director of the Alliance for Justice and chair of its Judicial Selection Project. With me is George Kassouf, the director of the Project. We appreciate the opportunity to appear before this Committee today.

The Judicial Selection Project is a coalition of lawyers, academics and representatives of civil rights, labor and public interest organizations that was formed in January 1985 to monitor appointments to the federal courts. The Project reviews the backgrounds of judicial nominees and their records on such issues as fairness, commitment to equal justice, pro bono activities, professional competence and judicial temperament. We believe that maintaining a strong, independent judiciary is essential to our democratic system.

The strength and independence of the federal judiciary is best achieved when the judicial selection process is properly carried out according to its constitutional design. After the President selects the nominee, the Senate should carefully scrutinize the nomination. As Senator Specter has stated, "The Senate of the United States has no more important duty than its constitutional responsibility for 'advise and consent.'" Floor Statement on Judge Bork's Nomination, Senator Arlen Specter, October 21, 1987.

At the very outset, it is the Senate's obligation to determine whether a judicial nominee has the intellectual capacity and legal skills to grapple with fundamental constitutional and statutory issues. Nominees for the appellate bench should meet the highest standards of excellence in the legal profession. As Senators Biden, Kennedy, Metzenbaum, Leahy and Simon have recognized, "[E]very nominee should have unquestioned expertise regarding a substantial portion of the

Federal court docket, and demonstrate a degree of excellence in that area of expertise....The job of the Federal appeals court judge requires someone with strong legal skills and a solid base of legal experience and training...." Nomination of Daniel A. Manion, Report from the U.S. Senate Committee on the Judiciary, Executive Report No. 99-16, 99th Congress, 2nd Session, June 19, 1986.

On the basis of reviewing Richard Nygaard's record -- litigation experience, academic credentials, speeches and case opinions -- the Judicial Selection Project concludes that he does not measure up to the high standard required for an appellate judge. It is not evident from his legal and judicial experience that Judge Nygaard has demonstrated true distinction or excellence in the law, and therefore, has not met the burden of showing that he merits a lifetime seat on the federal bench.

II. THE NOMINEE'S BACKGROUND

Richard Nygaard is a state court judge on the Court of Common Pleas in Erie County, Pennsylvania. He was appointed in 1981 and ran unopposed in 1983. The Court of Common Pleas is a trial court of general jurisdiction. Prior to serving as a state trial court judge, Judge Nygaard practiced law for ten years in the town of North East, Pennsylvania, where his law practice was of a general nature. The ABA Standing Committee on the Federal Judiciary, which routinely rates federal judicial nominees, gave Judge Nygaard the lowest possible approval rating -- a split rating of qualified and not qualified, clearly below the available superior ratings.

III. THE NOMINEE'S RECORD

The Project is concerned about Richard Nygaard's lack of competency, as reflected in his record and his very low ABA rating. While the Project does not view the ABA as the sole measure of one's qualifications for the bench, we do believe that it is a factor to be considered, particularly in evaluating an appellate court nominee.

Prior to his appointment to the state trial court, Richard Nygaard practiced law for ten years, and in his own words, his case load as a general practitioner "included only minor matters of litigation, domestic relations, counseling, estate planning and probate....Typical clients included families, small businesses and corporations around the North East, Pennsylvania area." Questionnaire, p.7. He did develop some expertise in the legal rights of the mentally retarded, as well as in bankruptcy law. Questionnaire, p.7. According to Judge Nygaard, however, "I appeared in court only infrequently." Questionnaire, p.8. He states that in 1979 and 1980 he appeared in court more often as his bankruptcy caseload increased. Questionnaire, p.8.

In regard to federal litigation experience, Judge Nygaard falls far below the standard required of federal appeals courts judges. He does not include a single federal case in listing his most significant litigated matters, as requested in the questionnaire. In fact, he states, "it is hard to find any ten cases which I would consider to be significant." Questionnaire, p.9. He lists only six of his cases -- all of which appear to be state cases and several of which he admits contained no significant matters. Those listed do not contain a single constitutional or complex statutory issue -- the kinds of issues handled routinely by the federal courts of appeals. Moreover, he has never argued a case before the Third Circuit Court of Appeals, the court to which he has been nominated and to which he has not been admitted.

Judge Nygaard now sits on a county court in Pennsylvania. For the last three years, up until this past August, he served as the presiding judge for the Orphans Court Division of the Erie County court. In that capacity, he heard routine, usually uncontested matters concerning guardianship, adoption, child custody, probate and the like. In addition, Judge Nygaard sat on the criminal bench every other month during this period.

In his seven years on the state bench, Judge Nygaard has decided very few cases involving federal constitutional issues. In fact, in his Senate questionnaire, he lists only two. His decision in one of those cases, involving the equal protection clause, was reversed by the Pennsylvania Supreme Court. [On appeal to the U.S. Supreme Court, it was vacated and remanded to the Pennsylvania high court. That court stood by its previous decision reversing Judge Nygaard. Astemborski v. Susmarski, 451 A.2d 1012 (Pa. 1982), vacated and remanded, 103 S.Ct. 3105 (1983), on remand, 466 A.2d 1018 (Pa. 1983).]

One of the best measures of Judge Nygaard's judicial abilities are the opinions of the higher courts of Pennsylvania. On a number of occasions, the Pennsylvania appellate courts have sharply criticized Judge Nygaard about the quality of his judicial decisionmaking -- specifically, for the lack of reasoning in his opinions and for overstepping his authority.

In Commonwealth v. Krysiak, Judge Nygaard sentenced the defendant to a minimum of 17 1/2 years and a maximum of 35 years in prison. In vacating the sentence, the Superior Court found that Judge Nygaard had failed to adequately state reasons for the sentence. The Court stated:

> "In the present case, reversible error is apparent on the record....Upon this record, we conclude that the lower court's remarks regarding its reasons for sentencing are of such 'brevity and conclusory quality [that] they do not manifest a consideration of the statutory guidelines for sentencing, nor otherwise explain the reasoning behind the sentences imposed.' (Citations omitted).
>
> ....
>
> "In the present case, the lower court's reference to the fact that it has considered the guidelines for sentencing, the presentence report, the psychological evaluation, the facts of the case, and appellant's prior record falls short of complying with the requirements of the Sentencing Code and the holding of Commonwealth v. Riggins, 474 Pa. 115, 377 A.2d 140 (1977). Moreover, the lower court's opinion offers no insight into its thought process at the passing of sentence...."

(Slip Op., February 1, 1985); Questionnaire, p. C-23, C-25. At his first hearing before this Committee, Senator Simon asked Judge Nygaard about this case and about his sentencing guidelines. Judge Nygaard assured the Committee that since Krysiak, he has made his colloquy with the defendant more extensive.

However, a year later, Judge Nygaard was criticized again for his inadequate sentencing methods. In Commonwealth v. Lord, Cheryl Lord, a mother of four living on public assistance, pled guilty to driving under the influence of alcohol and driving without a license. For the DUI, Judge Nygaard sentenced her to imprisonment of ten days to twenty-three months and imposed a fine of $1,000 on her. The jail sentence became moot when Lord was placed on parole, but on appeal, the Superior Court reversed the imposition of the fine. According to the Sentencing Code, a defendant shall not be fined unless it appears that "(1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." Pa. Code Sec. 9726(c). In determining the amount of a fine, the court shall consider "the financial resources of the defendant and the nature of the burden that its payment will impose." Pa. Code Sec. 9726(d). After quoting these provisions, the Superior Court stated:

> "We have reviewed the four pages of the verbatim sentencing transcript of February 3, 1986. There is nothing on the record to support a conclusion that the defendant will be able to pay a $1,000 fine. Nor does it appear that the sentencing court took into account the financial resources of the defendant and the nature of the burden that the payment of the fine would impose.
>
> "The Presentence Report shows that Lord was not presently employed but subsisting with her four children on public assistance. Her public assistance status was confirmed at sentencing by defense counsel and again in the Motion to Reduce Sentence....
>
> "Although the sentencing court, in its opinion filed May 1, 1986 pursuant to Pa.R.A.P. 1925, acknowledges that the appellant contests the amount of the fine, the court seemingly seeks to justify the size of the fine merely on the basis that '90% of all criminal cases with which this Court deals are in someway connected with the abuse of alcohol or the use of drugs' and the fact (?) that 'in a significant portion of all fatal traffic accidents, one or another of the operators of the vehicles was under the influence, or had been drinking alcohol.' The court neither explains how these factors are relevant in this case, involving a first-offender who ran a motor vehicle into a utility pole, nor why the clear mandate of Section 9726 of the Sentencing Code was not followed.

(Slip opinion, October 14, 1987); Questionnaire, p. C-71-72.

In Commonwealth v. Kunselman, 526 A.2d 443 (Pa. Super. Ct. 1987), Judge Nygaard sentenced the defendant to a minimum sentence of less than 3 years and a maximum sentence of 3 years, thus allowing the defendant to serve a sentence between 0 and 3 years in length. The Motor Vehicle Code, however, required a term of no less than 3 years. Judge Nygaard admitted that his sentence was an attempt to allow the defendant to serve his time in Erie County, even though Judges have no control over where the sentence is to be served. He also stated that the parole board would be forced by the Code to ensure that the full 3-year sentence was served. The Superior Court reversed Judge Nygaard again, holding that he had failed to follow the mandatory sentencing provisions and that he was usurping the power of the parole board. The Court stated:

> "The lower court shows a disregard for the legislative mandate and a misconception of his authority and the power and responsibility of the parole board."

526 A.2d at 444. Incidentally, Judge Nygaard failed to include this case in the his Senate questionnaire.

In Nancy E. M. v. Kenneth D. M., 462 A.2d 1386 (Pa. Super. Ct. 1983), a child custody case, a majority of the Court noted the inadequacy of Judge Nygaard's opinion below, but found the record sufficiently complete to allow a review on the merits. 462 A.2d at 1388, n.3. The dissent, however, had stronger words:

> "I believe that the opinion of the lower court is far too inadequate to allow a proper review of the case and, accordingly, would remand the case for entry of a comprehensive opinion....[T]he opinion is a scant three pages of which only half contains findings by the court. The court's statements for the most part are mere conclusions; no analysis of the testimony of the witnesses is provided."

462 A.2d at 1390. The Court affirmed in part and reversed in part.

In Commonwealth v. Gemelli, 474 A.2d 294 (Pa. Super. Ct. 1984), Judge Nygaard quashed a 27-count indictment against a former Erie City police chief. The former police chief had been charged with the unlawful taking of firearms from the police evidence room and profiting from their sale. He was also charged with criminal conspiracy, intimidating witnesses and obstructing justice. Nygaard had quashed the indictment on the grounds that the charges should have been brought under the Escheat Law and that the infractions were de minimis because he believed that the weapons were valueless. In reversing Nygaard's decision, the Superior Court stated:

> "We perceive absolutely no basis for dismissing such serious allegations as merely de minimus infractions. This is especially true in light of our holding supra that the issue of the application of the Escheat Law has been waived...."

474 A.2d at 301. At his first hearing, Judge Nygaard states that the Superior Court erroneously reversed his order on the basis that it was issued sua sponte. However, the Superior Court plainly states that the crucial issue concerned the so-called "de minimus" grounds, and it strongly disagreed with Judge Nygaard's characterization of the infractions.

In Commonwealth v. Lanager, 521 A.2d 53 (Pa. Super. Ct. 1987), Judge Nygaard found the defendant guilty of conspiracy to distribute narcotics. However, he later reversed himself "upon careful reflection and reconsideration of the facts." 521 A.2d at 56. The Superior Court reversed Nygaard, stating that a "trier-of-fact, in our mind, would be eminently authorized in making a reasonable inference from the evidence presented that the defendant conspired...." 521 A.2d at 57. In criticizing Judge Nygaard, the Court further stated:

> "We can find nothing in the facts that would alter our decision that the trial court (despite its statements to the contrary in its 'Additional Opinion' to us) engaged in a factual redetermination by converting guilty verdicts into not guilty verdicts; a practice not condoned by this Court. [Citations omitted.] .... We do not approve of such reconsideration when the facts warrant an affirmance of the judgment of the sentence."

sponte

521 A.2d at 58-59.

In Commonwealth v. Markley, 501 A.2d 1137 (Pa. Super. Ct. 1985), the defendant petitioned the court for a hearing under the Post Conviction Hearing Act, alleging violation of his appeal rights and ineffective assistance of counsel. Judge Nygaard dismissed the petition on the grounds of mootness. The Superior Court reversed on appeal, observing that U.S. Supreme Court precedent on the issue, which the defendant had brought to Judge Nygaard's attention, "was neither discussed nor cited by the P.C.H.A. court." 501 A.2d at 1141.

Obviously, any trial court judge can be and is reversed. However, these reversals reflect consistent, major problems in the nature of Judge Nygaard's judicial decisionmaking: his decisions are arbitrary and they lack thoroughness and analysis. He takes shortcuts to render judgments, instead of thinking through the issues. In addition, even though he has not handled federal issues as a judge, he has not dealt with them in any way, such as in scholarly journals or speeches.

IV. THE THIRD CIRCUIT

Richard Nygaard has been nominated to fill the seat of former Judge Joseph Weis, Jr., who served on the court of appeals for 15 years upon his appointment by President Nixon in 1973. At the time of his appointment, Judge Weis was a federal district court judge in the Western District of Pennsylvania, and had 31 cases published in the federal reporters in his 3 years on that bench. Prior to serving on the federal bench, Judge Weis practiced law for 18 years in Pittsburgh, building a substantial background of legal experience and training. As a jurist, he was described as "top notch" by attorneys appearing before him. 2 Almanac of the Federal Judiciary, "Third Circuit," p. 6 (1988).

The caliber and experience level of the other Third Circuit judges are equally high. Of the 11 active judges, 6 were federal district court judges before they were elevated. Three of the circuit judges had extended and distinguished service as judges in their state court systems: one served 20 years before his appointment, another had served at both state trial and appellate levels for 14 years, and the third had been on his state's supreme court for 5 years before his appointment. All of these judges had impressive credentials before their nomination, with a vast amount of judicial and litigation experience.

The same cannot be said of Richard Nygaard, at least not at this point. He is not qualified to serve on the federal court of appeals and determine questions of complex, constitutional and statutory importance. In the Third Circuit, the case load is heavy and intensive, and as stated before by several members of this Committee, the court of appeals should not be viewed as place for on-the-job training.

V. CONCLUSION

The courts of appeals are virtually the last court of resort in the federal system. Despite the Supreme Court's preeminence within the federal judiciary, as a practical matter, the appellate courts render the final decisions in the vast majority of federal cases; whereas the eleven circuits and the Federal Circuit hears tens of thousands of cases every year, the Supreme Court hears only about 150 cases. Consequently, the courts of appeals have the final word on nearly all the cases coming before them. A decision in a circuit becomes the law of that circuit, and moreover, becomes persuasive authority for other circuits and for the Supreme Court. Thus, for several reasons, the consideration of nominations to these courts is one of the most important aspects of the Senate's advise and consent powers.

We believe that Richard Nygaard does not possess the qualifications to sit on the federal court of appeal. We urge the the members of this Committee to give careful consideration to Richard Nygaard's background and record and to reject his nomination to this post.

The CHAIRMAN. Thank you for your usual thorough testimony. Let me pursue a couple matters with you.

You became very specific at the end of your testimony, but one of the things that I find somewhat perplexing over the years here is that if a prospective nominee has not had Federal trial court experience, either as a judge or as a litigant, with some either defense or in a capacity of moving on behalf of a plaintiff, I always hear that that's somehow a serious failure. And I want to explore with you for just a minute why is it relevant that someone would not have had any experience before a Federal court?

Ms. ARON. I think it is just one factor to take into account. But I don't think because Judge Nygaard has not appeared frequently before the Federal courts means that he is not qualified for the bench. There are other things to look at in determining his qualifications.

The CHAIRMAN. I understand that. Everybody brings that up, and I just wonder quite bluntly why it is so relevant. I guess the argument is that that is the only place or one of the few places where constitutional questions are litigated, and therefore somehow it is important.

The other thing you mentioned as if it were important—and others mention it all the time, also, not about Judge Nygaard, but others—is that he had little litigating experience and yet he is on the trial court.

So when they have litigating experience, you don't like them; then they say they have never been in trial court. When they have been in a trial court but have not had litigating experience, then you say, well, they have not had litigating experience.

Does it matter that someone, assuming they were otherwise qualified, had not been a litigator when they practiced, but had experience on a trial court?

Ms. ARON. I think that factor in and of itself would not disqualify anyone. Again, you don't look at just one factor here. There are many other factors involved in, we believe, Judge Nygaard's lack of qualifications.

The CHAIRMAN. So the thrust of your argument seems twofold—one, he has not followed the State legislative guidelines. He has either been unaware of them, not paid attention to them, or believed that he had the authority as a sitting trial court judge in the State of Pennsylvania to overlook them. And the second thing that you seem to be focusing on is that Judge Nygaard, at least in one important case, did not understand the law, or disregarded the law when being overruled by a higher court on the issue of whether or not the guns that had disappeared were relevant at all in a particular case, or important.

Is that the gravamen of your case, those two points?

Ms. ARON. The gravamen of the case, I think you accurately stated, concerns the quality, or lack thereof, of his judicial decisionmaking. And I think that comes through most prominently in the sharp criticism he has received from the appellate courts in Pennsylvania.

The CHAIRMAN. Thank you very much.

Senator Thurmond.

Senator THURMOND. Thank you very much, Mr. Chairman.

I have no questions. Thank you for appearing.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. You have, I understand, checked with the Erie Bar about this nomination; is that correct?

Ms. ARON. In the course of reviewing an individual's record, we generally make a number of phone calls and receive a number of phone calls about any given nominee, and we made a few phone calls of our own with respect to Judge Nygaard.

Senator LEAHY. And is part of your reasons for opposing him based on those calls?

Ms. ARON. I'd say the primary focus of our inquiry is based on Judge Nygaard's record. But we did speak with a large number of attorneys in Erie County, most of whom raised on their own the sharpness of criticism that Judge Nygaard has received from the appellate court.

Senator LEAHY. But none of those attorneys are going to testify here.

Ms. ARON. That's correct, which——

Senator LEAHY. So is it even fair to include—if they are unwilling, or don't have enough courage to actually stand up and state something publicly, is it fair, really, in a proceeding like this to include their remarks? I mean, there is no way that supporters of Judge Nygaard or anybody else can question them, can ask them what they base that on.

Ms. ARON. The primary basis of our objection and opposition to Judge Nygaard comes from his own record and his very lengthy questionnaire. That formed the basis of our opinion that we ought to look more closely into his record.

We were also interested in knowing what the local Bar thought of Judge Nygaard's views. But it is commonplace that lawyers, particularly those who are going to criticize a nominee, are reluctant to step forward and testify because they may have a case either pending or to be filed before the nominee. The hearing report that was prepared on the nomination of Susan Liebler stated that it is not unique for lawyers who will have to appear before certain judges——

Senator LEAHY. But lawyers did in that case; I mean, lawyers who would have to appear before her did come forward and spoke against her, as others spoke for her.

Ms. ARON. Well, in this particular case, I can tell you that we have spoken to a lot of lawyers, none of whom, because of the nature of their criticism, was willing to come forward.

Senator LEAHY. I must say that whatever decision I would make on this, I would base on what is in the record. I am disenchanted by hearing that there are lawyers who are critical of somebody, and they would be happy to tell you off the record, behind the closed doors, under the table or whatever, but they are unwilling to do it in public. And you know, the Bar enjoys a very good position in society. They usually make more money; they have ofttimes a more exciting life; they have really a favorite place in society. But oftentimes also, when it comes to judicial nominations, they are a bunch of gutless wonders.

This happens in my own State and every other State. I have seen judges come sailing through, where everybody on the record says they are the greatest man or woman in the world, and then they'll call you up and say, "Gee, I had to say that because I might have a case before this person; but you know, Pat, you and I both know that person is a jerk."

Well, I can't accept that. It is like the medical profession allowing a totally inept doctor, as happens in virtually every State in this country—it happens right here in Washington, D.C. and everywhere else—a totally inept doctor to continue practicing because you don't tell on your colleague because they may be thinking in the back of their minds someday they may be inept but want to keep on working, or lawyers who hope someday they may be up for a judgeship and hope nobody will say anything against them. And I don't mean this as a criticism of you. I know how difficult it is.

You are in the same position that virtually everybody who looks into one of these has—everybody will tell you off the record their criticisms, but not publicly.

I think the thing that would concern me is that apparently Judge Nygaard has never had a case, other than bankruptcy matters, in Federal court. Is that an accurate statement?

Ms. ARON. That's correct.

Senator LEAHY. I again appreciate the work you have done, and I think it is important you have done it, and I don't want you to think that when I talk about those who talk to you off the record that that is a criticism of you, because you stated very clearly that you made your statement based on what is in the public record. But I wish the same lawyers who often are critical of the quality of judges, State or Federal, they again are also the same ones who, number one, don't want to go to the work of trying to help select judges, and secondly, are unwilling to stand up when they see people coming up for nominations.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Leahy.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Ms. Aron, the information provided by Judge Nygaard is that he has had 30 to 40 cases appealed a year over the course of 7½ years, and he has been reversed 16 times, which means that he has been reversed out of a total of about somewhere in the neighborhood of as many as 250 cases, perhaps a few less than that. Would that correspond with your understanding of Judge Nygaard's record?

Ms. ARON. I think we came up with 17 reversals, in doing a Lexis search.

Senator SPECTER. Seventeen? That's pretty close to 16; out of a total number of about 250 cases or so?

Ms. ARON. [Nodding.]

Senator SPECTER. You are nodding yes?

Ms. ARON. I have no basis upon which to know, because not all those cases are reported. We looked at the reported cases.

Senator SPECTER. You have no basis, then, for disagreeing with what Judge Nygaard has said?

Ms. ARON. That's correct, that's correct.

Senator SPECTER. OK. When you talk about an effort to keep somebody in the local jail, that's a rather common effort by common pleas judges. And as you specified the facts here, he gave a sentence of up to 3 years.

Ms. ARON. Right. I think this is the case where he made an effort to keep a kid in the local jail rather than sending him to a State penitentiary.

Senator SPECTER. Are you familiar with the facts of that case so that you could make any comment as to whether Judge——

Ms. ARON. Yes, I——

Senator SPECTER [continuing]. Excuse me, let me finish the question—as to whether Judge Nygaard was operating other than a good motive and yet a case where it would be appropriate to try to keep somebody in the local jail? I mean, aside from the fact as to who has technical sentencing. I was district attorney for some time, and the judges did that as a matter of practice. So my question goes to whether you know whether Judge Nygaard's thrust was really an equitable one there, in that case.

Ms. ARON. I read that case, and I felt sympathetically toward Judge Nygaard's opinion. I think it involved a kid who was under 16 years of age, and I think Judge Nygaard made an effort to keep the kid locked up in a jail close to home rather than send him away. And I thought, upon reading the opinion that it represented a sympathetic, compassionate act on his part.

However, there was a State sentencing statute which provided very strict guidelines, and that statute basically allowed for no discretion on Judge Nygaard's part. And so, while I share your concern with that individual, the sentencing statute was pretty specific on that point.

Mr. KASSOUF. If I could just add to that, speaking about Judge Nygaard's good motive in that case, you might want to contrast it with whatever motive existed in the *Commonwealth* v. *Lord* case, involving a mother of four children living on public assistance. He fined her $1,000 without, according to the Superior Court, basing it on any of the information in the record, but on general statistics about alcohol-related injuries and traffic accidents.

Senator SPECTER. Well, we'll come to the *Lord* case in a moment. But sticking with the *Kunselman* case for this moment, I am interested to hear Ms. Aron's comment that she thought that Judge Nygaard was moving in the right direction at least on the equities.

The sentence, as set forth in your memorandum here sentenced the defendant to a minimum of less than 3 years and a maximum of 3 years. To be sentenced to a minimum of 3 years could be 2 years, 364 days, consistent with that sentence. And I infer that technically, that sentence qualified that individual to be retained in the local jail. And the parole board then had authority to decide whether he would serve 2 years and 364 days or 1 day more, or 3 years.

Now, I can understand mandatory sentences, although I have seen judges do a lot of things with mandatory sentences, disregarding them very, very frequently. But considering—well, you have already answered the question that you think that on the merits that Judge Nygaard was trying to do the equitable and fair thing with that individual. I don't see that stretch as being an enormous stretch, talking about an additional day, and the Parole Board had the authority to keep him in the additional day.

But let me turn to the *Lord* case. What is your name again, sir?

Mr. KASSOUF. George Kassouf.

Senator SPECTER. Mr. Kassouf raises the question of the *Lord* case. Your memo does not reflected the fact, at least as represented to me, that the fine was changed to $300. Were you aware that that was so?

Mr. KASSOUF. It's not reported in the Superior Court opinion.

Senator SPECTER. Okay. Now, aside from the fact that it is not recorded in the Superior Court opinion, are you aware that the fine had been changed to $300?

Mr. KASSOUF. No. Was that on re-hearing?

Senator SPECTER. Excuse me?

Mr. KASSOUF. Was that on remand?

Senator SPECTER. Yes.

Mr. KASSOUF. Well, then, obviously Judge Nygaard followed the dictates of the Superior Court opinion at that time, whereas he didn't before. That case followed a sharp criticism of *Krysiak*——

Senator SPECTER. Well, he hadn't failed to follow the dictates of the Superior Court opinion before. He didn't have the Superior Court opinion before, did he?

Mr. KASSOUF. He had an opinion from *Commonwealth* v. *Krysiak*, where the court criticized him for inadequate sentencing methods. So he was on notice that his sentencing methods were improper. *Lord* followed that case.

Senator SPECTER. But—well, he had the sentencing guidelines, and he had a lot of opinions to follow, but he hadn't been instructed by the Superior Court on the fine in *Lord* until the Superior Court entered its opinion.

Mr. KASSOUF. That's correct.

Senator SPECTER. And the Superior Court entered its opinion, and then he lowered the fine to $300. Do you think that that was fair compliance with the Superior Court opinion?

Ms. Aron is nodding in the affirmative.

Ms. ARON. Yes, I do, but the point is the nature of the criticism by the Superior Court. He did comply with the instructions when it was sent back to him.

Senator SPECTER. Have you read any opinions of the Supreme Court of Pennsylvania criticizing the Superior Court of Pennsylvania?

Ms. ARON. Not a whole lot, no.

Senator SPECTER. It is not uncommon for one court to criticize another. Have you read opinions by the Supreme Court of the United States criticizing the Supreme Court of Pennsylvania?

Have you read some Senators' speeches criticizing the Supreme Court of the United States?

Ms. ARON. We really confined our analysis to Judge Nygaard's reversals.

Senator SPECTER. Did you note any opinions of the appellate courts, complimenting Judge Nygaard for his work?

Ms. ARON. There is in one opinion—I think, *Commonwealth* v. *Montevecchio*—which is not raised in our testimony which is critical of Judge Nygaard and also at the same time, there is a sentence or two complimenting him; but the overall thrust of that opinion, as I recall, was to be critical of his reasoning in deciding upon the sentence. But there is a sentence in there that compliments him. That was the only one I could find.

Senator SPECTER. Did you review the appellate court records on the about 230 cases, approximately, where Judge Nygaard was affirmed?

Ms. ARON. No, we didn't.

Senator SPECTER. Well, there might have been some complimentary statements there. I don't know. There might have been.

One other case you comment about is a little unclear to me on the record that you cite here—where Judge Nygaard changed his opinion, *Commonwealth* v. *Lanager,* where he had entered a conviction, and then he later reversed himself, quote, "upon careful reflection and reconsideration of the facts".

Did you review the facts of that case to make your own independent judgement as to whether there was some basis for a reevaluation?

Ms. ARON. No. We confined our review to the Superior Court's reversal of him—given that the language was so strong in that opinion, we felt it pretty much spoke for itself. The court is pretty harsh in its criticism of Judge Nygaard.

Senator SPECTER. Well, the last sentence that you quote on page 9 of your statement: "We do not approve of such reconsideration when the facts warrant an affirmance of the judgment of sentence." Did they affirm his judgment of sentence—because as a matter of trial procedure, when you consider the verdict, to reconsider the verdict, that's in advance of the judgment of sentence. Judgement of sentence follows after the decision of the verdict. So if they are affirming his judgment of sentence, technically they are affirming what he did with the case.

Mr. KASSOUF. What happened in that case was the trier of fact convicted him, pronounced him guilty of the charges of conspiracy and possession of drugs, and then later, Judge Nygaard changed his mind. And there is something called a motion to arrest of judgment——

Senator SPECTER. Wasn't Judge Nygaard the trier of fact?

Mr. KASSOUF. Yes. I'm just stating it how the Superior Court states it. And then the Superior Court reversed but did not remand the case. They said since this case had been decided, he had been adjudged guilty, and a sentence had been given, we will just instruct the court to give him that sentence.

Senator SPECTER. Now, wait a minute—Judge Nygaard imposed sentence before he came to a final conclusion on the verdict?

Mr. KASSOUF. No, no. He came to a final verdict, but changed his mind after the sentence was imposed.

Senator SPECTER. Well, it seems to me that that could be a very good quality about reconsidering the facts, based upon whether the facts ought to be reconsidered. But in any event, you say you did not take a look at——

Mr. KASSOUF. Well, the——

Senator SPECTER [continuing]. Excuse me, I haven't finished my question—you say you did not review the facts to make an independent evaluation as to whether you thought Judge Nygaard was acting with reasonable discretion in changing his mind on the facts.

Mr. KASSOUF. Whether we think it was reasonable or not, the Superior Court felt it was unreasonable and an abuse of his discretion.

Senator SPECTER. Well, you have already testified to that. My question is different. My question is whether you reviewed the facts to have an independent judgment as to whether Judge Nygaard acted reasonably in changing his mind on the verdict.

Mr. KASSOUF. If you are asking for my independent judgment, I would affirm the guilty verdict.

Senator SPECTER. Well, now try answering my question. Did you review the facts independently in the matter?

Mr. KASSOUF. I reviewed the facts as stated in the Superior Court opinion.

Senator SPECTER. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Let me ask you one question. What do you think the caliber of the third circuit is now, as presently composed?

Ms. ARON. Well, very high. The judges who are currently sitting on the third circuit have very impressive qualifications and credentials. Of the 11 active judges, 6 were Federal District Court judges before they were elevated; 3 of the Circuit Court judges had extended and distinguished service as judges in their State court systems; one was a law professor for many years. This is a circuit that I think prides itself on the very high quality of its appointees.

The CHAIRMAN. I am sure Senator Specter would agree in saying that I think the third circuit is probably, if not the finest, one of the finest circuits in the country, and that is not pure parochialism, I don't think.

Does the fact that the present make-up of the third circuit is so impressive have anything to do with your recommendation? In other words, were the judge being nominated for another circuit, would your view be any different? Do you think it is colored by the caliber of the present circuit?

Ms. ARON. To some extent, I think it is. On the other hand, I think the committee has always pressed for the very highest standards of excellence for appellate judges. And I think those standards apply to a nominee who is being considered for any appellate court, not just the third circuit.

So I think that while you can't help but look at the third circuit, it is relevant to take into consideration the very high standard of excellence that this committee has set, or its nominees measure up to.

The CHAIRMAN. Thank you very much for your testimony.

Senator SPECTER. Mr. Chairman.

The CHAIRMAN. Yes. I'm sorry.

Senator SPECTER. Just one more observation along the lines that you have brought up.

Ms. Aron, in your opening statement, you comment about the nominee's background, and you note that his experience includes families, small businesses, corporations around northeastern Pennsylvania, some expertise in the legal rights of the mentally retarded as well as in bankruptcy law. In an effort to structure the court system—and my activities on this committee are second-to-none in terms of insistence on qualification—there is an effort made to have some representation. Judge Nygaard has had a very highly visible position because he had a hearing under unusual circumstances. Senator Leahy was gracious enough to see to it that he had a hearing. His commitments had been made, and he came down, and it was all over the Erie papers.

A lot of judges are heard by this committee and have never really gotten much notoriety in their home towns, and Judge Nygaard's situation has been very highly publicized. I spend a fair amount of time in Erie, and I have not had any communications from anybody in Erie raising the kinds of questions you have or the ones you allude to, although I think Senator Leahy dealt with that question adequately, and I am not going to deal with it any further.

But the question I would have for you is do you think it appropriate for the Judiciary Committee to look for some different kinds of experience—if you go to Philadelphia or Pittsburgh, you can find a lot of judges who know the securities laws backward and forward, and who know antitrust laws backward and forward, and who have been in a lot of courts and a lot of different experience. But as you know, the Court of Appeals sits in a panel of three. If Judge Nygaard is confirmed and he makes some critical mistakes, he will have somebody making the mistakes with him, because it is going to be a three-man—two concurrents, man or woman; we have woman judges on the Court of Appeals.

But my question to you is do you think it appropriate for the committee sponsors to look to somebody with a little different kind of experience. You say corporations around northeast Pennsylvania, or small businesses, or family. Do you think it appropriate to look for that kind of diversity and difference of background and view?

Ms. ARON. I do. And I also think it important, as the State Senator testified earlier, for there to be geographical diversity as well on the court of appeals. However, that said, it is also critically important to have nominees who possess the ability to deal with complex statutory and constitutional issues. And there is very little on the record to suggest that Judge Nygaard has the ability to delve into some of these very difficult and complex issues that are brought before the courts of appeals and to resolve them in a well-reasoned fashion.

The courts of appeals hear tens of thousands of cases a year; the Supreme Court hears a tiny fraction of those cases, I think only 150 a year. So the appellate courts are the last stop for an enormous amount of important statutory and constitutional litigation in this country. Therefore, I think while that other experience ought to be taken into account, one has to demonstrate a record of legal accomplishment to deal with some of those other issues, and I don't think that has been demonstrated here.

Senator SPECTER. Well, you emphasize the constitutional point, and I would agree with you on that. None of the cases which you have cited deal with the constitutional questions. There has been no criticism of him on those grounds.

I haven't reviewed his other cases to know to what extent he has dealt with constitutional issues, but at least on that ground there has been no contention that he has failed to understand the Constitution, has there?

Ms. ARON. It is difficult to base an opinion on only two cases, I think. I think we need to see more of a record or, if there is not a record, opinions, and to see whether Judge Nygaard has written any scholarly articles, given any speeches. There is one included in the questionnaire which is more or less a digression of constitutional law for the past 200 years. But we looked for other things——

Senator SPECTER. How was that one—was it a speech, you say?

Ms. ARON. It was a speech given, I think, to the Torch Club in Erie County, and——

Senator SPECTER. On constitutional law?

Ms. ARON. On constitutional law.

Senator SPECTER. A good speech?

Ms. ARON. Prepared a year ago.

Senator SPECTER. A good speech?

Ms. ARON. Adequate. Nothing distinguishable about the speech.

Senator SPECTER. But adequate.

Ms. ARON. I would say it was a description of constitutional law for the past 200 years with very little insight or analysis of those opinions.

The other articles that he includes in his questionnaire include "Christmas Memory," an article that described the innocence of youth; the Salvation Army delivers food to his family one Christmas, and he points that out as a poignant incident in his life. He includes an article that appeared in Fly Fishing Magazine, called "The Right Arm." He includes an article called "The Cool Clown," which talked about drug and alcohol problems. But one looks for, if it is not in the record itself, opinions outside the record, and we looked and have not come up with anything except what has been provided by Judge Nygaard.

Senator SPECTER. Thank you very much.

The CHAIRMAN. Thank you both. We appreciate it.

Now, Judge Nygaard, would you please come forward and be sworn?

Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Judge NYGAARD. I do.

The CHAIRMAN. Welcome back. I'm sure this is a trip you did not anticipate and would just as soon not have had to make, but I have several questions for you.

As you have heard, there has been criticism, repeated, from the court record by the court of your sentencing practices on at least several occasions, and it has been focused on here in the hearing by the witnesses who have just departed, and others who have raised it.

Would you explain the reasoning behind the sentences in the cases that have been referred to and why you chose apparently—and I say apparently—not to follow the sentencing guidelines?

TESTIMONY OF HON. RICHARD L. NYGAARD, NORTH EAST, PA, NOMINATED TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Judge NYGAARD. Perhaps I should take the last one first. In the case of *Commonwealth* v. *Kunselman*, in that case, I did not choose to not follow the guidelines. Indeed, there was serious question as to whether a sentence, or the statement that he must "serve a minimum of 3 years in prison," would require that a sentence be imposed of 3 to 6 years, or whether a sentence of 1½ to 3 years, would accomplish the same thing because as a mandated sentence, then the parole board would have no option to parole him before that 3 years was served.

The manner in which that came up, Mr. Chairman, was that before sentencing, both of the attorneys asked to see me—both the Commonwealth attorney and the defendant. The problem they brought to me was this. The mother of the victim was present in court to testify on behalf of the defendant, requesting clemency of the court. The issue of whether——

The CHAIRMAN. The mother of the victim?

Judge NYGAARD. The mother of the victim. The question then was brought up—my recollection is, by the district attorney, but I'm not sure; we discussed it among defense and district attorney—whether we could do that, the 1½ to 3 years, and he said he did not know. I asked if anybody had any objection if I fashioned a sentence which would keep this young fellow in the county jail. And if I might use the exact words of the district attorney when he came in there, he said, "Judge, we have a bubble-butted boy out there who is going to go to the State penitentiary, and is going to be meat for the fodder," or "fodder for the mill", or words to that effect.

I would hope that it comes through that I am also, in addition to being a tough sentencer, a man of compassion, and that is precisely what I wanted to do.

He was full-time employed. He had restitution to pay. I do not remember the precise amount. I don't remember that much about it, but there was restitution, or else he faced lawsuit. I did not want him to lose his job. If I could put him in the county prison, he could also then be, if qualified, released to perform his job, continue his rehabilitation, and provide money for the victim.

That is why we did it. I was taken aback by the criticism in the appellate opinion when I re-read it, because I did not recall that it was there before. And upon questioning by Mr. Metalitz about this case, which I alluded to in facts, but I couldn't remember what the case was—I had my clerk yesterday prowl through and find anything he could on that type of case, and he came up with *Kunselman*, and so I reviewed the case yesterday, last night, before coming in here. So my apologies for not having it by name in there. It is included in that section that referred to "corrected sentences."

I knew that type of case was out there, because I remembered it. That is the reason why I fashioned that sentence that I did in that case.

Now, with respect to the *Krysiak* case, that was a different issue. The issue in that case was whether or not, at the time of sentencing, I enunciated sufficient factors on the record to justify the sentence which I had imposed. I had developed and followed a format in my sentencing, because I have sentenced hundreds of people over the 7½ years and had, at the time of that sentence, sentenced a large number. I believe that sentence was imposed in 1982 or 1983. And I had a colloquy in which I considered the guidelines for sentencing, I considered a number of factors. That colloquy had been approved of by the Superior Court in a number of reviews.

This was the first time it was called into question, and as I mentioned at the time of my last hearing, upon similar questioning by Senator Simon, there was another case that I could not recall wherein the Superior Court had dismissed with a sentence or two, the allegation that I had not put sufficient factors on the record. I found that case and several others and brought them down and gave one to Mr. Metalitz and Margaret Morton.

However, I did correct my sentencing colloquy based upon their instruction.

The other one that was mentioned as not following guidelines, I believe, was the $1,000 fine case for "driving while intoxicated."

When I first went on the bench, Mr. Chairman, in 1981, I became very concerned, and all of my colloquys reflect that concern, with the carnage on the highway, caused by driving while intoxicated, and the brevity, shall we say, with which the court had dwelled on this issue. I used to impose a $1,000 fine in all cases, a minimum of $1,000. And in some cases, I would require that an unemployed person go out and find a job to pay that fine to make an impact on that person so that they would never come back again, and in some cases people have actually found jobs so that they could do that.

Cheryl Lord was a second or third offense drunk driver. It was not a minor case, in my opinion. I imposed that $1,000 fine, and I put her in jail for 10 days. I have, obviously, following that added to my consideration that it is not merely future ability to pay, which is in the guidelines and in the sentencing code, but it is the current ability, and I do not put people who are on public assistance up to that maximum fine, which I normally impose, unless at the same time I can find them a job.

The **Chairman**. You know there is a debate going on right now on the Federal sentencing guidelines.

Judge **Nygaard**. Yes, sir.

The **Chairman**. That went into effect in November of last year. As an appellate judge, you will be reviewing sentences imposed by the lower courts. What is your approach to sentencing guidelines generally, and can we have any reason to believe that you are going to take, whether you like it or not, the work of this body and, to be very parochial, myself in particular, and be deeply involved in changing the sentencing laws and the Federal Code, that you are going to take that into effect? What do you view your obligation to be?

Judge **Nygaard**. To follow them precisely. Now, the sentencing guidelines that you have developed are somewhat different from the ones that we have in that you have a far more thorough examination, or you provide a far more thorough examination of the crime, the victim, the individual, and all of those things, prior records, in coming up with a guideline sentence for this individual.

Our guidelines now are approaching that; they did not in the original guidelines. Our guidelines were that—guidelines—which provided a minimum sentence, a mitigated range and an aggravated range, and only provided that we would explain sentences in the aggravated or when we went outside the range.

So I would follow and do follow the guidelines—consideration of the guidelines, I should say. Very often, or occasionally, I do go outside them, but I explain it.

The CHAIRMAN. The *Gemelli* case, my last question. As I understand it, this is a case in which the police chief was charged with improperly removing firearms from the police evidence room, and you granted the motion to quash 27 of the 28 counts of an indictment. And the motion was even served on the prosecutor.

Judge NYGAARD. The motion—pardon me?

The CHAIRMAN. As I understand it, you moved not to quash 27—you not only moved, you quashed, 27 of the 28 counts of an indictment.

Judge NYGAARD. Yes, I did.

The CHAIRMAN. And the appellate court said we see absolutely no basis for dismissing such serious allegations. Tell us a little bit about that case.

Judge NYGAARD. Yes. There are two aspects of that, and the previous witnesses dwelt on the de minimis aspects which, standing on their own, would not have resulted in my decision. That case was a very significant case, and when it came to me, it was about half through. It was getting ready for trial. I met with the attorneys. I read the preliminary hearing and the grand jury transcript, some five volumes in all.

One of the elements of theft is that you must take "property of another." So when I review these transcripts and review it before I begin the trial, I look to see if each one of those elements have been met and meet with the attorneys and say; "Hey, you are going to have a little trouble with this element, you are going to have a little trouble with this."

I brought them in because in the transcript, when they were showing who owned these items—there were about 1,100 items that had turned up missing, everything from baseball bats and fishing rods to guns—the prosecutor had alleged and shown as to the ownership of these that they were property of the State, property of the Commonwealth, and under the Escheat Law, they were property of the Commonwealth; he used that law to show ownership.

I brought them in and I said aren't you going to have some problem here, because if these items are escheatable property, they are governed by the Escheat Law. And he said he didn't think so. So we got out the Escheat Law, which seemed to provide for how you deal with these things under the Escheat Law, which would have resulted in not felonies, but misdemeanor violations.

The attorney for the defense did prepare and did file a motion to quash. Unfortunately, he left it with me. I did have that motion when we considered it all, and it was not sua sponte.

Unfortunately he did not, unbeknownst to me, comply with the rules and file it also in the clerk of records, and it did not get filed until my opinion was filed. And in point of fact, it was the docket entry after the docket entry on my opinion.

So as I read the opinion of the Superior Court on *Commonwealth* v. *Gemelli,* the primary thrust of their reversal is that I decided that case sua sponte and not upon proper motion of defense counsel.

When I decide a case like that, all other issues raised by the attorneys, I address. So that when it does go on appeal, we can have an expression from the appellate court as to these other issues as well. I would hate to decide a case based upon one issue, have it appealed, come back and decide it again and have to go on appeal again. That was only where the de minimis intraction ruling came to bear.

The CHAIRMAN. Did prosecution have notice of this motion having been filed?

Judge NYGAARD. Yes. He was present when it was handed to me. We were all in the room together, Senator, talking.

The CHAIRMAN. And when was it handed to you—how long before the dismissal?

Judge NYGAARD. Oh, well in advance of the dismissal. It was handled—I bring the attorneys together for a pre-trial conference, and it was in that pre-trial conference that I brought it up, and when we met then to discuss—we had several other pre-trial arguments on this case, and it was in one of those conferences that it was presented to me. I will say this—I was the first one to bring the issue up. I said, "How are you going to deal with this?" And it was directed, I suppose, primarily to the prosecutor, because if he presented his case, and a demurrer was requested and granted, then it is all over. And I thought he should pay some attention to this matter.

The CHAIRMAN. The point that staff is making to me here is that the Government's attorney have pointed out that the appellate decision holds that in order for you to dismiss the case on that ground, the ground would have had to have been raised in the defendant's omnibus pre-trial motion over 6 weeks before the dismissal. And you are saying this in fact was raised?

Judge NYGAARD. No, no, Senator. It was not raised in the omnibus motion. The omnibus motions are designed to provide just that—raise all your motions now so you can get them decided.

There was only a request or a leave requested in the omnibus motion that it be supplemented at a later date. This was occasionally done by defense counsels and not often granted by the court. That opinion also seemed to say we can no longer do that, that they must specifically raise these issues in their omnibus motion.

I suppose in retrospect, I could have just not raised that issue and granted demurrer. The results would have been the same, because when he was tried, he was found not guilty. But he did have to come back for a trial.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Judge Nygaard, I think our distinguished Chairman has propounded some questions that I had intended to, and has cleared up anything here. I think you are well-qualified to be a circuit judge, and I will be glad to support you.

Judge NYGAARD. Thank you, Senator.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I agree with Senator Thurmond that you have covered the ground, Mr. Chairman. Since the question was raised about Judge Nygaard's writing, I have asked to see his speech on the Constitution, which I had not read in advance, and I have only scanned it now, but I think it ought to be made a part of the record.

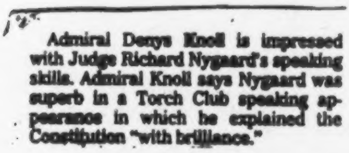
The CHAIRMAN. Without objection, it will be made a part of the record.

[Document follows:]

THE CONSTITUTION AT 200--
A CONTINUING CONVENTION

By Judge Richard L. Nygaard

I have chosen as my topic for this paper, the Constitution at age 200 and a discussion of what I call the continuing convention. What I hope to do is provide you with a little bit of insight as to the evolution of the Constitution in the past 200 years. As you can see, this is a rather ambitious undertaking. To outline the evolution of 200 years of constitutional history is more properly the subject of a several volume work. I will not claim to do the subject justice within the next few pages. However, I hope these brief vignettes I offer will provide for you the stimulation to further inquiry and hopefully open a few more windows through which you can view the constitutional progress of the past 200 years.



Admiral Denys Knoll is impressed with Judge Richard Nygaard's speaking skills. Admiral Knoll says Nygaard was superb in a Torch Club speaking appearance in which he explained the Constitution "with brilliance."

A

PART I

The nation recently observed a celebration held on September 17, 1987, commonly referred to as the 200th anniversary of the signing of the Constitution. This is actually the 200th anniversary of the Resolution signed by George Washington which ended the Constitutional Convention and submitted the Constitution to Congress for action. On September 28, 1787, Congress formally submitted the Constitution to the States for ratification. On June 21, 1788, the Constitution was finally ratified by the ninth State, New Hampshire, thus making us officially a nation, rather than a confederation of States.

Since that time, there have been over ten thousand two hundred proposed amendments to the Constitution. However, the Constitution has only been amended 26 times. This Constitution, so simply yet carefully written, has a procedural guarantee built into it which requires that every amendment proposed must pass through a very careful and deliberate procedure, thus assuring that the Constitution will not be lightly taken, nor easily amended. Yet, I believe that each one of us in the room recognizes that the Constitution means something different to the American of 1987 than it did to the American of 1787.

Indeed the Constitution has gone through such constant and continuous evolution that the manner in which it is now being interpreted and the extent to which it bears on our daily lives, would hardly be recognized either by those who wrote it, or the earlier Courts which interpreted it.

The responsibility for this evolution lies to a great extent with the evolution of the function of the United States Supreme Court. The precise role of the Judiciary in our American system of government was not defined in our Constitution. Even a cursory examination of the Constitution provides some rather dramatic evidence of the unspecified nature and the formless character of the Judicial power that was established in Article Three of the Constitution.

Article One of the Constitution establishes the Legislative Branch. The nature and power of Congress is described and circumscribed in approximately 2,300 words. The description of Congress in Article One, Section 8, includes a wordy and quite precise elaboration of the authority that our Legislative Branch is intended to exercise.

Article Two of the Constitution creates the Executive Branch. In approximately one thousand words it describes the authority of the President and lists the numerous specified powers as well as the more general responsibilities given our Chief Executive.

In contrast to this, the Constitutional provision which constructs the power of the Court, Article Three, consists of less than four hundred words. It contains no listing or itemization of the powers similar to those describing the other two branches of government. While Article Three, Section Two, addresses the jurisdiction of the Federal Court System, there is little delineation of the nature of its power. Indeed, this Article seems to take power for granted by simply stating without any explanation that the "Judicial power of the United States shall be vested in the one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish".

The "powers vested in one Supreme Court". What is the Judicial power? How is it to be used? What role is the Court to play in government? These questions were left specifically unanswered. It was left for the Court, with the acquiescence of the other branches of government, to define just what this Constitution means and to state just what the power of the Judiciary really is. However, the vague definition of the power in the Constitution and this conspicuous and perhaps deliberate omission, is of critical important in appreciating the historical development of the Constitution and of the Supreme Court.

This is true to a much greater extent in an examination of the Judiciary than it is in the examination of the other branches, because the Court has developed and determined for itself the dimension of its role and the dimensions of its power.

The definition of the role of the Court has been a continuing evolution. However, its importance was relatively quickly established. It was established not only by the United States Supreme Court itself, but also by the attention which the new Americans paid to the Court as a system for resolving their disputes. At last they had an independent branch of the government to which they could turn for resolution of their disputes. You have to understand that in the history which precedes the development of America, many of those who populated America either had unchallenged aristocratic power themselves, or were completely powerless.

The laws which had been passed by the several States and the power which had been jealously guarded by the people, mandated the development of a fair and impartial Judiciary to which all could turn. The aristocracy realized that it was the only way by which they could maintain power. Others realized that it was the only forum available to those who otherwise had no access to power. Alexis deTocqueville, in his popular book, Democracy in America, remarked that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a Judicial question". And so it is that American history is in no small measure a Judicial history of constitutional and legal development. American law, American political history and American Judicial history are inextricably intertwined with the study of Constitutional law.

However, the Constitution that was written in the hot summer of 1787 in Philadelphia and ultimately ratified in 1790 by Rhode Island, the last reluctant State, has endured some changes. I am not speaking of the 26 amendments to the Constitution. That to which I now refer is that evolution of meaning and application given it by the Presidency, the Congress and to the greatest extent, or at least most notably, by the United States Supreme Court. It is to this that I refer as a "continuing convention".

We all either know or can find out who the participants were in that first convention. For those of us who remember our American history and for those of us who have recently renewed our interest in American constitutional history, names like Hamilton, Franklin, Randolph, Washington and Morris are familiar to us. They were the influential and powerful of their day-- aristocrats who had access to power--landowners, Attorneys, Judges, politicians.

They are the ones who sat down in Philadelphia, closed the windows and literally sweated their way through the development of the Constitution. I would like to provide you with a few vignettes and a few more names of which you may not be aware, who have participated in the continuing convention. I would like to introduce you to some of these people who are lesser known and who, without the Court, may never have had access to affect change. The currency of politics is power. The currency of the Courts is comprised of issues, logic and reasoning. The conventioneers whom I now introduce had little or no political currency, but because of a fair and impartial judiciary and because they possessed the currency of the Courts- justiciable issues and compelling logic- they were able to effect change.

PART II

Most of us in the room could name the eight Judges of the Erie County Court of Common Pleas; the eight on the United States Supreme Court, and the 7 on the Pennsylvania Supreme Court. However, few of us could name all of the Justices of the Peace elected to office in our County. This is simply not considered to be one of the more important offices in the Judiciary. However, the name of one who failed to become a Justice of the Peace has become one of the most important names in the continuing Constitutional Convention.

William Marbury was one of the so called "midnight justices", who was appointed Justice of the Peace in the District of Columbia by President Adams on the last day of his Presidency. Marbury had been duly appointed, but because of a last minute mixup, his commission had never been delivered to him by John Marshall, the Secretary of State. President Jefferson, upon assuming the office, issued some commissions, but not that of Marbury. Marbury requested that James Madison, the new Secretary of State, deliver his commission. Madison likewise declined. Marbury, then the rejected and potentially forgotten J.P., sought a Writ of Mandamus from the United States Supreme Court to force delivery of his commission to him.

He relied for his right to sue in the Supreme Court on a section of the first United States law dealing with the United States Courts. It was the Judiciary Act of 1789. This Act provided that the Supreme Court should have the power to "issue Writs of Mandamus in cases warranted by the principles and usages of law to persons holding office, under the authority of the United States". This provision surely supported Marbury's right to relief from the United States Supreme Court. He requested its assistance. This was in 1801--a politically turbulent time in our governmental history. The Federalists no longer had control of the government and the Presidency. Thomas Jefferson, a Republican, had gained control of the Presidency. Republicans enacted a new Judiciary Bill repealing the Bill which created the "midnight Judges". Congress, out of hostility of the Republicans towards the Federalist dominated Supreme Court, passed a bill which abolished the June and December terms of the Supreme Court. This forced an adjournment of the Supreme Court for eighteen months. Consequently, Marbury's Writ of Mandamus was not argued before the Supreme Court until February of 1803. This rather unusual case, regarding a rather simple and lowly appointment became, however, the benchmark for the development of the Judicial role as the final interpreter of the Constitution.

Marshall, in his opinion for the Court, denied the Writ of Mandamus, held provisions of the Judiciary Act of 1789(already repealed) unconstitutional, and thus in a brilliant stroke, gave the President what he wanted by denying the appointment to Marbury and established the Supreme Court as the body empowered to render final decision on the constitutionality of any law or issue.

The holding (as we refer to the soul and life of a case) was merely that Congress does not have the authority to enlarge the powers of the United States Supreme Court. However, the implications of Marbury v. Madison are far reaching. From that date forward, no one questioned the authority of the Supreme Court to declare a law unconstitutional.

William Marbury never did get his commission as J.P. The defendant in the case, James Madison, served as Secretary of State under Thomas Jefferson and as President of the United States. I am sure he would be well remembered and his spot in American history secure as a writer of the Constitution, a primary drafter of the Bill of Rights, and a Republican President, even if he had done as Mr. Marbury wanted. Furthermore, he would have avoided the situation which must have been as unpleasant then as now, defending a lawsuit. However, by this lawsuit and by this very important precedent, William Marbury became perhaps the most famous name in the most famous case ever decided by the United States Supreme Court and a hitherto unknown became a participant in the ongoing convention.

Our next participant, under a grant of authority by New York, operated a steam ferry across the Hudson River between New York and New Jersey. His name was Aaron Ogden. Not an important job, not an important position; and, I'm sure if his license to do so had gone unchallenged, he, too, would have sunk into obscurity along with the boat on which he operated. However, Thomas Gibbens also operated steamboats on the same ferry run. He had obtained his license under the Act of Congress passed in 1793.

Aaron Ogden filed suit in New York to enjoin or prevent Mr. Gibbens from competing with him in the ferry business from New York to Elizabethtown, because he claimed that the New York Legislature's grant of this right to him was exclusive; a monopoly. Aaron Ogden won. However, Gibbens appealed to the United States Supreme Court.

The United States Supreme Court in an Opinion also written by Chief Justice Marshall, entertained the suit based upon the "Commerce Clause" of the Constitution. The Constitution does not give Congress general power to make laws. Instead, a law which Congress enacts must be based upon one of the express grants of authority found primarily in Article I, Section 8 of the Constitution. Certainly one of the most significant of these powers given Congress is the so called "Commerce Clause", which provides that Congress shall have the power to regulate commerce with the foreign nations and among the several States.

In his appeal to the United States Supreme Court, Gibbens claimed that only Congress had the power to regulate commerce and that the ferry from New York to New Jersey was subject to the commerce power of the United States, legitimating the grant of authority given to him and superseding the authority given to Aaron Ogden by New York. In the United States Supreme Court, Gibbens won.

Everyone agreed that the new national government was a government of limited or delegated powers. That is, if there was a power granted to the national government in the Constitution, the national government had that power. Otherwise, it did not. However, the question of how broadly the United States Supreme Court would or could construe the power given to the national government was of extraordinary importance in an analysis of just how effective the national government would be. By ruling in favor of Thomas Gibbens and against Aaron Ogden, the Court established the authority of Congress under this new Constitution to regulate commerce, which did indeed supersede the authority of the States to do the same thing. New York and Aaron Ogden acquiesced in the decision of the Court. Its role thus became more firmly established. Aaron Ogden took his place in Constitutional history.

Our next conventioneer is a man by the name of James McCulloch, an insignificant cashier of the Baltimore branch of the Bank of the United States. He had issued notes upon which no State tax had been paid. The State of Maryland sued in the Maryland Courts to enforce its Bank Note Law, which imposed a tax on all banks which; (1) operated in the State of Maryland; and, (2) were not chartered in Maryland. The Maryland Courts predictably ruled against McCulloch and he appealed to the United States Supreme Court. The Court in this case held that the national government was limited to those powers delegated to it by the Constitution. However, when it did act within those powers, the Constitution made such actions "the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding". So, if the chartering of a bank was within the power granted to Congress, then a State could not impose its tax on the bank without violating this supremacy clause. Marshall went on to state that the incorporation of the bank was both necessary and a proper means for carrying out the powers expressly delegated to Congress to "lay and collect taxes". It is in this case that John Marshall went on to state these famous words in his Opinion: " Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional".

This declaration of constitutionality was likewise acquiesced to by the State of Maryland. The cashier, James McCulloch, took his seat in the classrooms of constitutional law.

When Chief Justice John Marshall died in 1835, Andrew Jackson was President of the United States. President Jackson appointed his Secretary of the Treasury and one time Attorney General, Roger B. Taney, to succeed John Marshall as Chief Justice.

The Taney Court left most of the precedents of the Marshall Court untouched, but appeared to continue the tradition of the Marshall Court. An interesting exception came in the case known as the "Propeller Genessee Chief". In this case the schooner Cuba, which was bound for Oswego, New York, from Sandusky, Ohio, collided with the Genessee Chief and sunk. The owners brought suit in Federal Court to recover the value of its cargo. Since the Federal Courts are of limited and well defined jurisdiction, the only basis which the owners could find in order to bring their suit in Federal Court was a claim of admiralty jurisdiction under the Constitution. They claimed that admiralty jurisdiction had been legally extended in 1845 to cases "upon the lakes and navigable waters leading into or connecting the same".

Chief Justice Taney wrote the Opinion for the Court. The decision held that the Act of Congress was a permissible extension of admiralty jurisdiction. Thus, the Supreme Court issued its constitutional sanction of an Act of Congress which permitted the extension of jurisdiction under the admiralty provisions of the Constitution. You will recall that in the case of Marbury v. Madison, the Court had held that Congress could not extend the jurisdiction of the Courts. However, in this case the Court found that laws such as the Act of 1845 were permissible extensions of jurisdiction so long as they were based upon constitutional foundation and not barred by constitutional limitation.

Unfortunately, the case for which Chief Justice Taney is most famously or infamously known occurred shortly before the Civil War. Many historians point to this case as one of the prime precipitators of the final emotional fires which led to the Civil War. Dred Scott was born a slave in Virginia in 1795. From there that he was taken to St. Louis and sold to a Dr. John Emerson. Dr. Emerson was an Army surgeon and took Dred Scott with him to Rock Island, Illinois and then to Fort Snelling, in Wisconsin territory. After the Doctor's death, Scott became the property of his widow and her brother, John Sanford, who lived in St. Louis. Dred Scott brought suit in the Missouri State Courts against his owner, claiming free status.

In the State Court suit, the Missouri Supreme Court ruled that Dred Scott's journey into free territory and into a free State did not elevate him from his status as a slave. Thus, when he was returned to Missouri, he remained a slave. Following the conclusion of this State lawsuit, Dred Scott filed suit in Federal Court against John Sanford, claiming the right to be in Federal Court by reason of "diversity of citizenship". The Federal Court in Missouri held that the law of Missouri controlled and that under Missouri law, his travels to free territory or a free State did not emancipate him from his slave status. Since he was not a citizen of any State for purposes of Federal jurisdiction, he could not bring suit in Federal Court. Dred Scott appealed to the Supreme Court. He based his suit in part upon his residence in Wisconsin territory. In Wisconsin, his status was governed by the Missouri Compromise of 1820, which provided that slavery was forever prohibited in the United States territories North of the parallel that formed the southern boundary of the State of Missouri.

The Chief Justice, now over eighty years old, delivered the opinion of the Court. The Court declared that blacks, whether or not they were slaves, had been regarded as inferior at the time the Constitution was adopted and therefore could not be citizens within the meaning of the Act which permitted suits by citizens of two different States. The Court held that Dred Scott was not a citizen because he remained a slave even though he had been taken into a free State and a free territory. Since he was not a citizen he could not rely upon diversity of citizenship to gain access to the Federal Court. For the second time in the history of the United States Supreme Court, an Act of Congress had been declared unconstitutional and Dred Scott took his place in the books of constitutional history.

The Supreme Court's two hundred year history is a series of cycles of activism and restraint. In the interest of brevity, I am limiting my examination to two--that represented by the Marshall and Taney Courts--and now the most recent cycle and perhaps the cycle of activism of which we are most familiar, that which surfaced in the 1950s. We refer to this period as the Warren and Burger Courts. Thereby, I suppose, either crediting or blaming our Chief Justices, depending upon your point of view. This period of activism is best known for its interpretation and expansion of the Bill of Rights and their application to State action. Examine with me, if you will, some conventioneers from this period.

In 1951, a resident of Topeka, Kansas, sued the city school board on behalf of his eight-year-old daughter. She was required to cross railroad tracks to catch the bus for her school, which was 21 blocks away. Her father wanted her in a school which was only five blocks from home. The difficulty presented to this family was that they were black. The school which his daughter attended 21 blocks from home was black. The school which was only five blocks away and which she wished to attend, was white. The case was heard in Federal Court, which took testimony describing and comparing the courses of study and the accommodations of the two schools. They found that the schools were substantially equal and relying on the current law, a case called Plessy v. Ferguson, (the case which enunciated the Separate but Equal Doctrine), they ruled against the black family. The man who had filed suit was Oliver Brown. This case became one of the most significant cases of the Warren Court, perhaps the most famous since Marbury v. Madison--Brown v. the Board of Education. The case was argued twice before the United States Supreme Court. On May 17, 1954, the Chief Justice read this momentous decision. The Court was unanimous. It ruled that segregation in public schools deprives children of "the equal protection of the laws guaranteed by the Fourteenth Amendment".

Since 1896 when the United States Supreme Court decided Plessy v. Ferguson, the "separate but equal" doctrine had been the law of the land.

Plessy was now explicitly overruled by Brown and the course of interpretation of the Fourteenth Amendment changed one hundred and eighty degrees. Oliver Brown and his daughter, Linda Carol, had become participants in the continuing convention.

On May 23, 1957, the Cleveland, Ohio, Police Department arrived at a private residence. They were refused admission without a warrant. They forced the door, handcuffed the occupant and searched her house for a person whom they wanted for questioning and for evidence of gambling. They found neither. However, they did find books which they believed to be obscene and arrested her for having them. She was later convicted for possessing the obscene material and sentenced to prison. Ohio's highest Court affirmed the conviction. The case was appealed to the United States Supreme Court. The defendant claimed that in as much as the officers disregarded this, the evidence which they seized should not be used against her. She claimed that to do otherwise would reward the officials for their own violation of the law. There was, however, a flaw in the argument; the guarantees of the Fourth Amendment only applied to Federal, not State actions.

The Supreme Court held that the Fourth Amendment does indeed set standards for search and seizure and in its Opinion held that the Fourteenth Amendment requires that State Judges must indeed uphold these standards.

The Fourth Amendment, which had previously applied only to Federal officials, now applied to State officials as well. Further, the Supreme Court decided that the State as well as the Federal Court was forbidden to use "evidence secured by official lawlessness" against a defendant. Dollree Mapp, in her suit against Ohio, had prevailed and Mapp v. Ohio stands for the principle which we now call the "exclusionary rule".

"Almighty God, we acknowledge our dependence upon thee, and we beg thy blessings upon us, our parents, our teachers and our country". This was the prayer approved by the Board of Regents of New York for use in classrooms throughout the State. In 1958, New Hyde Park voted to use that prayer to open each school day. At least one parent objected and asked that the New York Court order prayer discontinued. Both the New York Constitution and the nation's forbade any "establishment of religion". However, the New York Courts held that by adopting the Regent's prayer, schools were showing no preference for nor were they teaching religion, nor would or could any school compel a student to pray. Steven I. Engel took his case to the Supreme Court. The Supreme Court's Opinion, issued in June of 1962, held that the Regent's prayer was indeed unconstitutional, because the constitutional writers thought religion "too personal, too sacred, too holy" for governmental intervention.

This was one of the first of the "prayer cases". The Supreme Court had now begun a series of decisions with respect to the meaning of the "establishment" clause of the First Amendment and Steven Engel took his place in the books of constitutional history.

On January 8, 1962, the Supreme Court received in its morning mail an envelope addressed merely to the Court. No specific Justice, just the United States Supreme Court. Written in pencil on paper provided by the prison in which the writer was incarcerated, was a request that the United States Supreme Court review a Florida decision which denied the petitioner his Writ of Habeas Corpus. The writer was serving a five year term for the crime of breaking and entering into a pool room in Panama City, Florida. He contended that the State had deprived him of liberty without "due process of law". The gravamen of his complaint was that he had requested that the Court provide counsel to represent him in his defense and the Court had refused. However, under current law, the Florida Court had correctly decided the case against him. In the case of Betts. v. Brady, decided just twenty years earlier, the Supreme Court had rejected a contention that the due process clause of the Fourteenth Amendment guaranteed counsel in State criminal trials. Now, by accepting this petition for review, the United States Supreme Court had, in effect, agreed to reconsider that decision.

Before the United States Supreme Court, Clarence Earl Gideon prevailed. All nine Justices agreed that no one should have to defend himself against a felony charge. Further, they held that if a defendant has no money for a Lawyer, the State must appoint one for him. The Sixth Amendment was now applied to the States.

Interestingly, when the case was called for retrial before the Florida Court, Gideon did not want an Attorney to represent him and said he would represent himself. The Court, irrespective of Gideon's wishes, appointed an Attorney to at least sit with him at counsel table. Gideon finally permitted the Attorney to represent him. At his second trial he was acquitted.

On June 13, 1966, the United States Supreme Court handed down its decision in the case of Miranda v. Arizona. In perhaps one of the most famous criminal issues ever decided by the United States Supreme Court, they held that whenever a suspect becomes the focus of an investigation, any custodial interrogation must first be preceded by an explanation to the defendant of his constitutional rights. The Supreme Court held that these rights are of little consequence to a defendant if he is ignorant of them. Before any policeman could commence interrogation of a suspect, that officer must first tell the defendant that he does indeed have a right to remain silent and that he has a right to an Attorney.

Thus, even should a defendant completely incriminate himself by full confession, unless he has first been apprised of his rights, that statement may not be used as evidence against him. Since the time of this decision, literally thousands of cases across the United States have further refined and interpreted this particular provision. It is seldom that we Judges hear a motion to suppress a statement made by the defendant in which the Petition does not rely in whole or in part upon the alleged failure of the interrogators to apprise that defendant of his constitutional rights. Yet, for all its notoriety, very few cases have been dismissed for violations of the Miranda Rule.

At the outset of these considerations by the Warren Court, there existed an extensive debate among both the academicians and the Justices themselves as to State application of the various rights contained in the first ten amendments to the United States Constitution. Some Justices, including Hugo Black, subscribed to the "incorporation theory". Under this theory, all of the rights contained in the Bill of Rights were applicable to the States by virtue of their incorporation into the Fourteenth Amendment. While this argument did not initially prevail, Mr. Justice Black's position was eventually vindicated. For, the first eight amendments have all now been incorporated and applied to the States by virtue of the Fourteenth Amendment, piece-meal.

There is, however, tremendous and scholarly support for the piece-meal approach, which maintained that the Bill of Rights could only be applied to the States based upon specific cases or controversies brought before the Supreme Court and decided by the Supreme Court through the use of the due process clause of the Fourteenth Amendment, issue by issue, amendment by amendment.

PART III

But the primary focus of scholarly debate has turned on the nature of constitutional interpretation, or more precisely, the extent to which the discretion of the individual Judges has affected the constitutional interpretation and indeed extended constitutional applications to subjects previously unconsidered. I believe all constitutional scholars now concede that the Supreme Court does indeed legislate; that the Supreme Court does indeed extend the Constitution. The central question for scholarly discussion is not whether the Court legislates, but what is the constitutionally proper range of these excursions. The issue itself is a basic discussion of the Court's authority in our system of government.

Indeed, over the last few months, we have heard more about "activist" Judges and "restraintist" Judges and what I call "retroactivist" Judges, than ever before. Scholars have once again rekindled, reignited and reconsidered the debate over what they consider to be the appropriate scope of the Court's authority from the vantage of each debater's philosophical position. Further, the Court's perceived undemocratic structure tends to polarize discussions about its place in our governmental system. Laurence Silberman observed, "we have more to worry about an imperial judiciary than we have an imperial presidency or an imperial Congress, because we can throw the rascals out of the Executive Branch or the Congress, but we cannot throw them out of the judiciary".

Thomas Jefferson, whose belief in democracy has stood the tests of history, wrote in a letter to William C. Jarvis in 1822, "Our Judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps...and their power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control".

Further, Alexis deTocqueville warned, "the President, who exercises a limited power, may err without causing great mischief in the State. Congress may decide amiss without destroying the union, because the electoral body in which Congress originated may cause it to retract its decision by changing its members. But if the Supreme Court is ever composed of imprudent or bad men, the union may be plunged into anarchy or civil war".

Justice Black once cautioned that "it seems to me that a majority of the nine members of this Court are not only without constitutional power, but are far less qualified to choose a new constitutional political theory than are the people of this country". Justice Black's philosophy was that whenever the Court "discovers" and enforces values that are neither specifically enumerated in, nor thoroughly traceable to some provision in the Constitution, that they have then usurped the power and authority of the other branches of government or of the States.

Chief Justice Harlan Fiske Stone used the analogy of a pendulum when he spoke about activism and a prior Court "enacting their own economic prejudice into law. What they did placed in jeopardy a great and useful institution of government. The pendulum has now swung to the other extreme and history is repeating itself. The Court is now in as much danger of becoming a legislative constitution-making body, enacting into law its own predilections".

As I previously said, the American Courts, since their inception, have occupied a position of power unique in the history of governments. Over the past 200 years, this power has been so defined that some have concluded that Judges have taken from the democratic political process so many fundamental issues, that we now have a krytocracy. This type of an argument is far more significant and has far more impact on non-Judges than Judges. Indeed, this consideration is the one thing that makes Judges most self-conscious about the power we exercise. That the position of Judge or of Justice of the Supreme Court is powerful is beyond question. But how powerful it could become is still a matter of conjecture and debate because, on the whole, for 200 years the Courts have tended to take seriously to one extent or another our role as decision makers and our role as guardians of the separation of powers.

Those who wrote the Constitution, those who write and enact the laws, are fiduciaries who have made a representative promise to the people. Judges are the enforcers of that covenant. To do more, while the results may be attractive, productive or apparently necessary, may place the processes, democratic and judicial, at risk. Courts and Judges do make law--but only intersticially, one case and one situation at a time.

Thus, as one Justice pointed out, while we are not knights-errant with a roving commission to second guess our other two branches of government, nor to cure all the ills of society, we do and must, however, fill gaps; gaps created by governmental inactivity, political cowardice, or those created inadvertently or deliberately in laws.

We must not infer, however, that the United States Supreme Court bears the full responsibility or full blame for interpretation of the Constitution. Constitutional limitations have a direct impact on the laws that are passed by Congress and the policies, treaties and the administration of the Executive. Not all cases of constitutional interpretation come to the Supreme Court. Only the contested ones. For the thousands upon thousands of other decisions made by the other branches, along with laws passed by the other branches, must also pass through a constitutional analysis to determine whether they do or do not pass constitutional muster.

And there are significant democratic safeguards in the process. Decisions of the Court are not necessarily final. They are usually always subject to legislative review and, if necessary, correction by the enactment of contrary laws by the legislatures themselves. Indeed, this is a regular occurrence. Additionally, in no other branch of government or for that matter other decision making body, is the process so open as it is in the Courts.

Pleadings and Briefs are all public property, open and subject to review. Hearings and Arguments are open to the public--we need no Sunshine Law. All decisions must be supported by logical and carefully worded opinions. If a Court does err it is easily discernable. There is more scholarly and academic research into the legal process and the Court than either of the other branches. The Courts are professionally and academically-albeit not democratically- accountable. But I do not believe they should be. As Judge Howard Markey, Chief Judge of the United States Court of Appeals for the Federal Circuit observed, "somewhere is needed at least one stable and settled institution capable of applying rules of justice that rest on permanent principles, capable of resisting the seemingly sudden bursts of frenzied passion from which,...even free societies are not immune".

Finally, the very selection process is democratic. A President appoints one to be a Justice whom he believes is representative of the type person indicated to him by his popular election. The democratically elected Senate confirms or rejects the appointment based upon careful consideration in their role as representatives of the people. There are democratic guarantees in the selection of Judges.

Thus, you will not hear me argue against appointment, or for that matter, life appointment of Judges or for greater democratic accountability. I believe it is absolutely essential that the power or authority exercised by our Judges be based upon their relative freedom from the moral, political and personal restraints which are used to lobby, leverage and develop policy as the other branches of government exercise their power in the democracy. I do so, however, upon the belief that our Judges are not constitutionally authorized to pursue or effectuate their own personal, political or moral agenda, but must enforce law consistent with the constitutional, precedential and professional constraints placed upon this least democratic branch of government. I am concerned that when political, personal and moral theories of the interpretors become imbedded in our constitutional fabric, they then become subject to change with the constituency of the Court or subject to rejection by those who feel the Court's view is not representative of theirs.

Whether as active or retroactive, the Courts as an institution are not designed to make public policy. When we do, and it is unwise, unrepresentative of or unresponsive to society, we weaken and sap the true strength of the judiciary, the reasoning process. If we exercise activism at the expense of the process and accept and expect agreeable results as our criterion, we face a judicial nihilism from the inevitable public dissillusionment when their high expectations for, and their beliefs in the power of judicial reasoning collapse. While the results are important, the integrity of the process must be maintained. The brilliance of activism fades quickly when one remembers that any given

Court or any given Judge may have social, moral and personal positions which are diametrically opposed to your own.

In the past, selection of Judges and Justices has hardly been news. They are, after ~~all~~, "the least dangerous branch". But the landscape is changing. There is now open and unbashful debate and discussion about the rejection of a Judge's nomination to the United States Supreme Court. Much of the discussion and debate with respect to Judge Bork's acceptance or rejection is based upon his philosophy and not his scholarship. It's based upon his ideology and not his judicial ability. The Judiciary is now attracting something more than academic attention. Perhaps it is because we recognize the Judiciary's critical role in our lives and in what I have called "the continuing convention".

Where does all this take us or where does all this leave us? I am not sure I really know. But if any of us are to participate in an intelligent or informed fashion in the selection of local judges, or in the selection of an Executive and Legislators who will appoint our Federal Judges, it is important that we have at least a fundamental grasp of the concept of separation of powers; the type jurist a governmental candidate is likely to appoint or confirm; and, the importance of a prospective jurists philosophy.

Where do I stand? I believe that democracy is something more than merely an instrument to produce better decisions. I believe that democracy is intrinsically valuable. Therefore, I would exercise extreme caution before I would intrude into any of the areas constitutionally occupied by the legislative and executive branches of government. I was appalled recently to listen to two Judges express their beliefs that they felt justified in ignoring a law duly enacted by the legislature if "they believed it would produce an unjust result". I may be wiser today than I was when I became a Judge, but I do not believe that I immediately gained wisdom or any greater perception of social mores merely by becoming a Judge.

Perhaps I can't describe myself. I am not a retroactivist. I have too much respect for precedent, stare decisis, and the body of laws and expectations built upon confidence in Court stability. I am not an activist in the mold of the two Judges of which I spoke. I have too much respect for the separation of powers and too strong a belief in the democratic process. But, while I do not intrude upon the areas constitutionally reserved for the other two branches, with equal emphasis, I do not shrink from the responsibilities resting squarely upon the Courts--deciding controversies; providing protection of individual rights; and, judicial review of governmental action.

Throughout my career, I have searched in vain for universal, objective principles of law which are both enduring and value-neutral. And, just as I believe I have discovered such a theory or philosophy, I find it cannot stand the ultimate test--case application. Truth is, law has neither a philosopher/patron saint nor a central philosophically-driven method or theory. Long on ritual and ceremony and lacking in abstract doctrine, the law has become the consumate pragmatist, its future guided primarily by its past--precedent, which, like a legal sea anchor, stretches out behind us on an ever- lengthening line.

It has been said that the life of law is the search for truth. If this is so, and I firmly believe it is, then the ideal system belongs to he who finds it and the best system we can hope to achieve awaits only a judiciary who honestly continues the search. I am a Judge. I am a searcher. I will accept your considered description of me. For I, like all in public life, cannot escape that most pervasive, most penetrating and least forgiving judge of all--history.

END

Partial

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Presented to the Erie, Pennsylvania Torch Club on October 7, 1987.

Go to tape FIRST
for FOOTNOTING

A-34

Senator SPECTER. It runs 33 pages; the 34th page is an extensive bibliography. It discusses some very interesting cases—*Ogden* v. *Gibbens*—we might have had some questions on that case. He quotes de Tocqueville; he quotes Justice Black; he quotes Justice Harlan. And to hear that you gave this to the Torch Club, Judge Nygaard, on an October evening in 1987, I think is pretty impressive.

The CHAIRMAN. Will the Senator tell us what the Torch Club is?

Senator SPECTER. No, I will not. But perhaps Judge Nygaard will.

Judge NYGAARD. I will be happy to, if you wish.

The CHAIRMAN. Yes. I am just curious what the Torch Club is.

Judge NYGAARD. The Torch Club is a club of individuals who—I think the only requirement is that you have an advanced degree—a doctorate, maybe a masters, permits you to be in. That's the only thing I am aware of. So it is composed of doctors, lawyers, professors, engineers, scientists—a fascinating group.

The CHAIRMAN. I was just wondering who would listen to a 31-page speech on the Constitution. That is why I asked the question.

Senator SPECTER. Oh, I think that's really the question that goes to the heart of the issue. Did you present this speech in toto to that club?

Judge NYGAARD. I did, and Senator, we had a lively question and answer discussion afterward. So they not only listened for 31 pages, but I piqued some curiosity while I was at it.

Senator SPECTER. Well, Judge Nygaard, I congratulate you on this document, this speech, but I congratulate the Torch Club even more. [Laughter.]

Mr. Chairman, I also would like to make a part of the record a very short article in the Erie Times News entitled, "The Cool Clown" in which, as the editor notes:

> County Court Judge Richard Nygaard is so concerned with the drug and alcohol problems of young people that he took time from his busy schedule to write the following article, entitled "The Cool Clown," geared toward the area's youth.

He talks about John Belushi, he talks about John "Bonzo" Bonham, drummer of the rock band who died by choking after drinking. He talks about an 18-year-old who died; Richard Pryor, who nearly burned himself to death; Art Linkletter's daughter.

I had a 47-page speech which I put in the record after talking for 30 minutes on the drug issue yesterday. I suspect that this brief article had more impact on a critical area than many of the erudite comments, including my speech—not yours, Mr. Chairman——

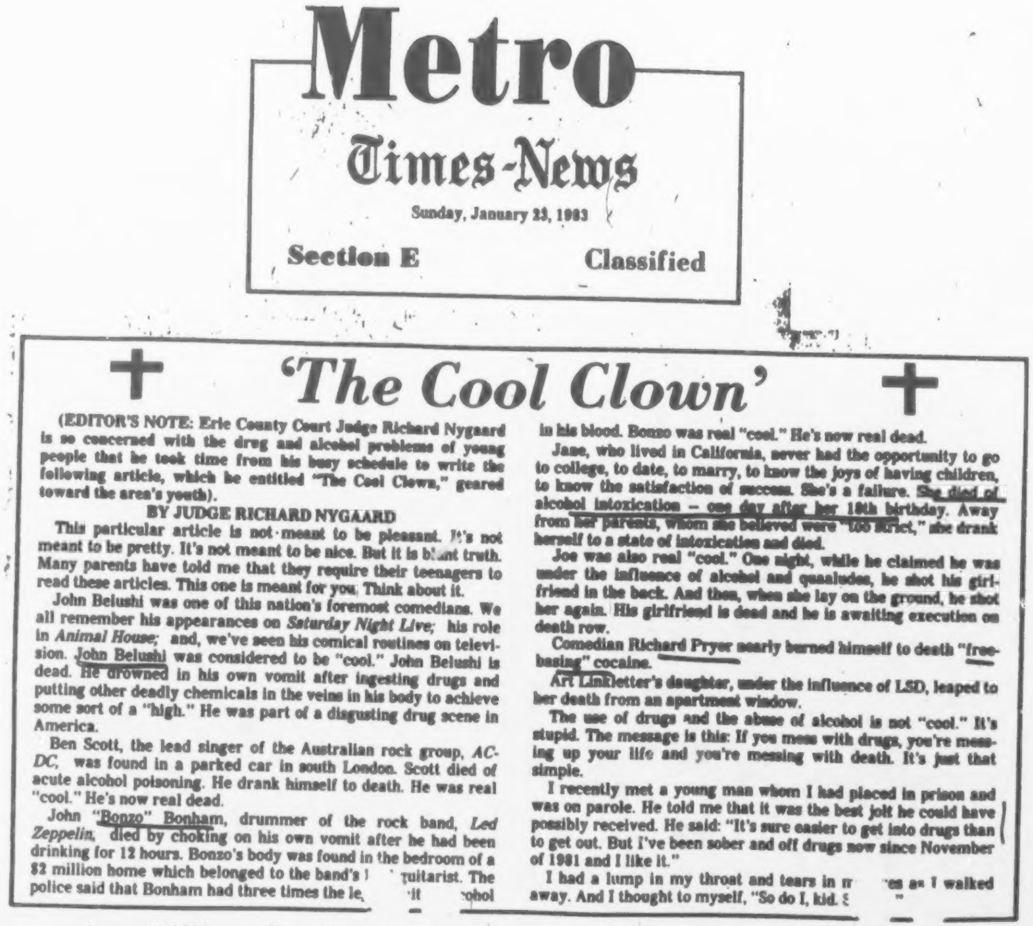
The CHAIRMAN. No; mine have impact, you are right.

Senator SPECTER. But I would like this article made part of the record as well.

The CHAIRMAN. As a matter of fact, mine have impact more than I want sometimes.

The article will be included in the record.

[Document follows:]



Metro
Times-News
Sunday, January 23, 1983
Section E Classified

‘The Cool Clown’

(EDITOR'S NOTE: Erie County Court Judge Richard Nygaard is so concerned with the drug and alcohol problems of young people that he took time from his busy schedule to write the following article, which he entitled "The Cool Clown," geared toward the area's youth).

BY JUDGE RICHARD NYGAARD

This particular article is not meant to be pleasant. It's not meant to be pretty. It's not meant to be nice. But it is blunt truth. Many parents have told me that they require their teenagers to read these articles. This one is meant for you. Think about it.

John Belushi was one of this nation's foremost comedians. We all remember his appearances on *Saturday Night Live;* his role in *Animal House;* and, we've seen his comical routines on television. John Belushi was considered to be "cool." John Belushi is dead. He drowned in his own vomit after ingesting drugs and putting other deadly chemicals in the veins in his body to achieve some sort of a "high." He was part of a disgusting drug scene in America.

Ben Scott, the lead singer of the Australian rock group, *AC-DC,* was found in a parked car in south London. Scott died of acute alcohol poisoning. He drank himself to death. He was real "cool." He's now real dead.

John "Bonzo" Bonham, drummer of the rock band, *Led Zeppelin,* died by choking on his own vomit after he had been drinking for 12 hours. Bonzo's body was found in the bedroom of a $2 million home which belonged to the band's l guitarist. The police said that Bonham had three times the le, it ohol in his blood. Bonzo was real "cool." He's now real dead.

Jane, who lived in California, never had the opportunity to go to college, to date, to marry, to know the joys of having children, to know the satisfaction of success. She's a failure. She died of alcohol intoxication -- one day after her 18th birthday. Away from her parents, whom she believed were "too strict," she drank herself to a state of intoxication and died.

Joe was also real "cool." One night, while he claimed he was under the influence of alcohol and quaaludes, he shot his girlfriend in the back. And then, when she lay on the ground, he shot her again. His girlfriend is dead and he is awaiting execution on death row.

Comedian Richard Pryor nearly burned himself to death "free-basing" cocaine.

Art Linkletter's daughter, under the influence of LSD, leaped to her death from an apartment window.

The use of drugs and the abuse of alcohol is not "cool." It's stupid. The message is this: If you mess with drugs, you're messing up your life and you're messing with death. It's just that simple.

I recently met a young man whom I had placed in prison and was on parole. He told me that it was the best jolt he could have possibly received. He said: "It's sure easier to get into drugs than to get out. But I've been sober and off drugs now since November of 1981 and I like it."

I had a lump in my throat and tears in m es as I walked away. And I thought to myself, "So do I, kid. S "

The CHAIRMAN. Judge Nygaard, quite frankly, since this is the last you will be before the committee, it is difficult for us sitting up here, given the responsibility of a requirement to vote yes or no. In some cases, it may seem somewhat presumptuous of us to pass judgment on women and men who may or may not be more qualified than we are to serve on the Bench or to serve in high Government positions.

You are, if approved, going to, I think, one of the most qualified circuits in the country, men and women whom I suspect you have looked up to in terms of their legal acumen and their ability to deal with complex issues.

I, quite frankly, would feel better if you were being nominated for a Federal District Court position. It does concern me slightly the ABA's not only split decision, but it is not split as well-qualified and not qualified; it is a split decision with the qualified portion being the lowest qualification of those that can be given, nonetheless qualified, another portion not qualified.

But I quite frankly, as it is a close call for me, I look—and I am not being solicitous—I look in those cases to Senator Specter, who knows you well and knows this issue and knows the court. And the fact that he is willing to go to bat makes a big difference because he also, when he does not think someone is qualified, including in his own State, is not reluctant to say so.

So I expect that I will be voting for you. My reluctance that I am stating now is one that I feel an obligation, whenever I am going to be opposed to someone or I have some real reluctance, I feel it is important to tell them face-to-face as to why. It doesn't go to your likely or in fact judicial temperament; we have heard nothing but good things, and based upon your presence before this committee, you have confirmed that you have sound judicial temperament. And I, quite frankly, am positively moved by the fact that you are able to mix being tough when you have to with genuine compassion when it is needed.

I quite frankly find the fact that you wrote the article referred to earlier and the article about the Salvation Army coming to your home, I don't view those as somehow insignificant attempts at legal writing; I view them as significant attempts at trying to make an impact upon a community from a position of some authority.

But I would sincerely hope that if you are in fact confirmed and go to the third circuit, that you do everything in your power to rise to the intellectual standards of that court. And the fact that you don't have a background before the Federal Court is not to me something that should be disqualifying.

And I sincerely hope that you take seriously the guidelines, or don't expect to go to the Supreme Court no matter what Arlen Specter says.

I wanted to say that on the record and say that with you here.

I apologize, I did not notice that the Senator from Alabama had come in. Would you like to ask any questions of this nominee?

Senator HEFLIN. No questions, Mr. Chairman.

The **Chairman**. I thank you. There are no further questions from the committee, and you are dismissed.

Senator **Specter**. Mr. Chairman, might I just add for the record the article "A Christmas Memory" that you referred to?

The **Chairman**. Yes, it will be included.

[Document follows:]

A Christmas Memory

EDITOR'S NOTE: The following narrative is by Judge Richard Nygaard who joined the Erie County Court of Common Pleas in May 1981. He practiced law in North East for 10 years prior to his appointment to the bench and, from January 1978 until May 1981, he represented the 6th District on Erie County Council.

I think it was the Christmas of '46 or '47, I'm not exactly sure. I don't suppose it really matters for purposes of this narration, except that the Depression that hit in '29 had not yet left our home in Thief River Falls, Minn.

Dad was a butcher. But when he was home in the winter, he was perpetually sick with asthma. Mom did "day work" and took in washing and ironing to help make ends meet. I am told that life was an economic struggle to get by. But, I didn't know it. This was when life was young. I was in those halcyon, irresponsible years when there was nothing one had to do. Just play. All the things one needed seemed to appear, just when needed. And Christmas was that magical, mystical time of deep snow, wreaths and candles, trees, caroling, church, and the delicious aromas of all the wonderful Norwegian foods. Life was secure. My world did not extend beyond the perimeters of my own neighborhood in my own little town. And, my relationships were uncomplicated by anyone other than my extended family and the small church we attended.

But this year was different. The hustle and bustle that usually preceded the holidays was not there. Things were quieter. But that was all that I realized. It was the morning of the day before Christmas. My brother and I were playing on the kitchen floor. Mom was doing the wash. There came a knock at the door and two men entered our house carrying boxes. They were from the Salvation Army and from the Zion Lutheran Church. Some of the boxes had turkey, roast, potatoes, apples, oranges, candies, fruits, vegetables, and all the fanciest trimmings necessary for a Christmas dinner! The other boxes were loaded with presents for each one of us in the family! I thought it was wonderful.

But I didn't know why they had brought them to us. You see, I didn't know there had been no food in the house for Christmas dinner.

I didn't know there was no money to buy Christmas presents. I didn't know why it was that when the men left my mother hid her face in her apron and began to cry.

Nor did I know why she went quietly into her bedroom and knelt beside her bed.

I *do* know now and, I, too, give thanks to Him whose birth we celebrate at Christmas.

Senator SPECTER. And might I also say, Mr. Chairman, that we have a Reverend Dwayne Brock present today. He is the President of the NAACP of Erie. If Reverend Brock might stand—I know we did not intend to call him as a witness, but I think it is significant that Reverend Brock has come to Washington in support of the nomination of Judge Nygaard. There is an inference of some concern about minority rights and some concern about constitutional issues from the presence of Reverend Brock here.

The CHAIRMAN. I thank you, Reverend, for making the trip.

Thank you very much, Judge, and good luck.

Judge NYGAARD. Thank you very much, Senator, and to the committee.

Senator SPECTER. Mr. Chairman, having just talked to Senator Thurmond very briefly, might we just ask Reverend Brock to be sworn and to state his opinion as to Judge Nygaard?

The CHAIRMAN. Yes, if he can do it briefly.

Please come forward, Reverend.

Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Reverend BROCK. I do.

The CHAIRMAN. Would you state your name and occupation and address for the record, please?

TESTIMONY OF REV. DWAYNE BROCK, PASTOR, FIRST GOOD SAMARITAN AFRICAN METHODIST EPISCOPAL ZION CHURCH, ERIE, PA

Reverend BROCK. My name is The Reverend Dwayne Brock. I am the pastor of the First Good Samaritan African Methodist Episcopal Zion Church and the past President of the Erie Branch NAACP.

The CHAIRMAN. How far past, Reverend?

Reverend BROCK. Two years.

The CHAIRMAN. Do you have a brief statement you'd like to make to the committee?

Reverend BROCK. Yes, sir.

Mr. Chairman and members of this very distinguished committee, I took the time out of my busy schedule to come and to support the nomination of the Honorable Judge Richard Nygaard due to the fact that many people do not know the personal aspect of the man, and I do.

We are personal friends. I have travelled very extensively in the civil rights circles and in the theological circles, and with 18 years of experience in the ministry, I find very few people with the personal integrity that Judge Nygaard possesses.

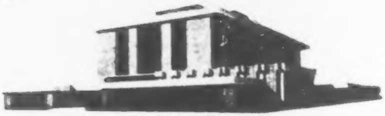
We are personal friends. He took the time out of his schedule to come to a morning worship service in our church and to speak to our young people concerning making decisions, positive decisions, in life. That meant an awful lot to me, and still even our young people are speaking about that.

Also, Judge Nygaard had the honor, and we had the honor of him performing my personal marriage ceremony with my beloved, and I am very, very thankful for that.

Also, Mr. Chairman and members of the committee, I possess a letter from the Honorable Mayor Louis J. Tullio in support of Judge Richard Nygaard.

The CHAIRMAN. Mayor Tullio's letter will be entered in the record.

[Document follows:]


Municipal Building

CITY OF ERIE
PENNSYLVANIA

Mayor Louis J. Tullio

October 3, 1988

Senator Joseph Biden, Chairman
and Members of the
Senate Judiciary Committee
Senator Russell Building
Room 489
Washington, D. C. 20510

Re: Honorable Richard L. Nygaard
Third Circuit Appointment

Dear Chairman and Members of the Committee:

I am very pleased to learn of Senator Biden's return to active leadership of this Committee. My prayers and thoughts were with him throughout his illness and recovery.

I had expected to accompany Judge Nygaard to the full Committee Hearing, but am restrained by an extremely important matter regarding the City of Erie Budget for 1989. However, I have prepared this letter to be presented to you so that there is no doubt of my endorsement of Judge Nygaard's appointment to the Third Circuit Court of Appeals.

As you know, Judge Nygaard is a Republican, but I can say without hesitation that he has been an excellent Judge of the Court of Common Pleas, and a good friend to us in our Democratic City government since his appointment seven years ago. When he was elected to a full ten year term in 1983, he won both party nominations and led both tickets in the general election.

Judge Nygaard has extensive qualifications and a wide range of experience to bring to the Third Circuit. His memberships in the NAACP, the Erie Association for Retarded Citizens, the Erie Council for Exceptional Children, and prior to his law practice, in five different labor unions, demonstrate that Judge Nygaard has never seen himself as an elitist or unapproachable jurist. The Erie area would be extremely proud of its first-ever representation on the Third Circuit Bench, and the Federal Judiciary would be very well served by Judge Nygaard's confirmation.

Senator Joseph Biden, Chairman
and Members of the
Senate Judiciary Committee

I, therefore, am grateful to the Committee for scheduling this hearing, and again state unequivocally my support for the swift confirmation of Judge Nygaard to the Third Circuit.

With best wishes to all on the Committee, I remain

Sincerely,

Louis J. Tullio.

Louis J. Tullio,
Mayor

LJT/cms

The CHAIRMAN. I do thank you, Reverend. It is—and I am not being facetious—a long trip, and obviously you would not have made it unless you feel strongly. Your presence here and your comments will be, I am sure, positively viewed by everyone on the committee.

Are there any questions anyone would like to ask?

Senator Thurmond.

Senator THURMOND. Mr. Chairman, I don't have any questions, but I just want to commend you for coming here, since you feel strongly in behalf of this nomination. By your appearance here and your close personal contact, your testimony carries great weight.

Reverend BROCK. Thank you, sir.

The CHAIRMAN. Thank you very much, Reverend.

Reverend BROCK. Thank you, sir.

The CHAIRMAN. Now the Senator from Alabama, Senator Heflin, has very graciously agreed to Chair these hearings at least for a little bit, from this point on. I am going to have to leave for a moment.

But I would first like to call, before I do, our next witness, D. Brooks Smith. Mr. Smith, would you please come forward? Before we introduce you further, would you stand and be sworn?

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. SMITH. I do.

The CHAIRMAN. D. Brooks Smith has been nominated to the Western District of Pennsylvania District Court, and we will enter, in the interest of time, Mr. Smith's résumé in the record.

I would now at this moment turn the hearing over to the Senator from Alabama, Senator Heflin.

Welcome, Mr. Smith.

[Whereupon, Senator Heflin assumed the Chair.]

Senator Heflin [presiding]. Would you like to introduce any members of your family or anybody who might be here with you today, Mr. Smith?

TESTIMONY OF HON. D. BROOKS SMITH, ALTOONA, PA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Judge SMITH. Thank you very much, Senator. I would just like to introduce my wife, Karen, who made the trek down here with me and who is present.

Senator HEFLIN. Judge Smith, last year, the court on which you sit had the unhappy experience of being sued by the ACLU. As I understand it, the suit came about because of an even unhappier fate that had befallen the ACLU's clients, a class of criminal defendants before your court. Some of them were sitting in jail for as long as 5 years after they had been convicted, but before sentence was pronounced.

I know this lawsuit was quickly settled. What was your role in it? Were you a part of the problem or a part of the solution?

Judge SMITH. I would like to think, Senator, that I was only a part of the solution. I'll leave others to make the determination. As to whether or not I was any part of the problem, let me say simply by way of historical background, the problem reached back to the late Seventies that resulted from a lack of judicial manpower. several illnesses, deaths and resignations of prior judges of the court, and therefore a backlog situation built over a period of years.

It is correct that as a result, a number of unsentenced but convicted prisoners remained in jail, awaiting sentencing, for an all too long period of time. I would like to emphasize that none of those cases were cases that had been tried before me or were before me. However, when this matter was not solved administratively by the court, the Chief Justice of Pennsylvania called me in July of last year and asked if I would be willing to assume the post of Administrative Judge of the Court of Common Pleas. I had at that point in time only been on the court for about 2½ years, or a little more than 2½ years.

I assumed that post and started off by developing a post-verdict motions policy, which the other judges and I adopted and which I believe brought about greater systemization of our disposition of post-verdict motions and which also sought to quantify court data, something that a small court such as ours has had problems doing, not having been ushered into the 20th century and having the benefit of computerization yet.

But as a consequence, we were able to in a period of time drastically reduce the backlog, see that disposition was made of all the affected parties, and as a consequence, I really believe that our court, the Court of Common Pleas of Blair County, is now one of the most current courts in the Commonwealth of Pennsylvania.

Senator HEFLIN. All right, sir. I am going to ask you several questions. Try to make it as brief as possible, because they tell me you are not controversial, so I would say that any extra words might add controversy.

Judge SMITH. You perhaps should talk to my wife, Senator; I am not sure that that is always the case.

Senator HEFLIN. All right. Your experience in cleaning up dockets may stand you in good stead on the court to which you have been nominated if you are chosen for it. The two positions being vacant for more than 3 years are among the longest-standing vacancies in the country. If confirmed, are you willing to roll up your sleeves and tackle the backlog that has built up in the Western District of Pennsylvania?

Judge SMITH. I would like to think, Senator, that my experience with backlog in the Court of Common Pleas at Blair County, PA, together with what energy I have sought to exert there, can be equally applied to the Western District of Pennsylvania, and I certainly would anxiously welcome the opportunity to roll up my sleeves and dig into that problem and hopefully lend whatever administrative abilities I have as well.

Senator HEFLIN. The court to which you have been nominated has had some bad publicity recently because of the attitude of one of its judges displayed toward women lawyers, particularly those who do not use their husbands' names in their professional lives. The fact that this attitude still exists in some of our Federal courts provides the context for my next question.

You sent a letter to Chairman Biden on September 22, which I will make a part of the record at this time. In that letter, you indicated that you believed that your continuing membership in the Spruce Creek Rod and Gun Club, if confirmed, would be inconsistent with the ABA's commentary to its Code of Judicial Conduct.

This club, as I understand it, expressly limits its membership to men. The bylaws so state. When did you first become aware of this restriction?

[Document follows:]

D. BROOKS SMITH
JUDGE'S CHAMBERS
BLAIR COUNTY COURTHOUSE
HOLLIDAYSBURG, PA 16648

September 22, 1988

Honorable Joseph R. Biden, Chairman
Committee on the Judiciary
U.S. Senate
S.D. 224
Washington, D.C., 20510

Dear Chairman Biden:

As a nominee to a vacancy on the United States District Court for the Western District of Pennsylvania, I have recently been asked for clarification and supplemental responses to my Senate Judiciary Committee questionnaire. Pursuant to discussions this week with Mr. Steve Metalitz of the Committee staff, I am submitting this letter to expand upon my answer to question #2 of Section III (General-Public) of the form.

As I have already noted, I am a member of the Spruce Creek Rod and Gun Club, a small hunting and fishing club which limits its membership to men (there are no racial or religious restrictions upon membership). I am aware of the ABA's Commentary to its Code of Judicial Conduct which states that it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of race, sex, or religion.

I have indicated, in response to Mr. Metalitz' questions, that I believe my continuing membership in the Club, if confirmed, would be inconsistent with the ABA commentary. Accordingly, my intentions would be to take affirmative steps toward opening the Club to both male and female membership (women guests have always been welcome). Failing in such efforts, I believe that adherance to the Code would require my resignation from the Club.

Trusting that this information is helpful to you and the other members of the Committee, I remain

Sincerely,

D. Brooks Smith

D. Brooks Smith

DBS/tjw

cc: Honorable Strom Thurmond
Stephen Metalitz ✓

Judge Smith. I have been a member of the club, I believe, since 1982, Senator, and while I was aware, I believe, that there were no female members of the club, I was not aware that this was a specific provision until earlier this year when, for the first time, this rather small and rather informal and non-business-related type of club published a packet which included a membership list and which included bylaws. And it was at that point in time that I first noted the bylaws provision.

Senator Heflin. Your letter continues:

> Accordingly, my intentions would be to take affirmative steps toward opening the club to both male and female membership. Failing in such efforts, I believe that adherence to the Code would require my resignation from the club.

Tell me specifically what affirmative steps you plan to take with regard to this membership restriction. What do you plan to do if those steps are unavailing, and how long will you wait before deciding whether you have succeeded or not in opening the club to women?

Judge Smith. Well, first of all, Senator, I think the most important step would be to attempt an amendment to the bylaws. Failing that, I believe an additional step would and could be—and I would support, and have indicated to at least one member of the club that I would support and attempt—an application for membership from a woman. Failing that, I believe that I would be required to resign.

I think it would also be necessary for me to await an annual meeting which is, as I understand it—and I preface it with "as I understand it" because I have not been an active member in any real sense of the word, but I believe there to be an annual meeting every April—and I believe I would have to await that point in time to at least attempt a bylaws amendment.

Senator Heflin. As a practicing attorney, you rarely appear in Federal courts. None of your ten most significant cases was a Federal case. Do you anticipate any difficulty making the transition from State court to Federal court?

Judge Smith. I do not anticipate any considerable difficulty in the transition, Senator. I do not believe that temperament or integrity are the exclusive realm of any one court or another. I don't believe demeanor to be that, either.

I believe that as a State court judge, as a practitioner, I was called upon to deal with statutory interpretation, constitutional interpretation, and these two are not the exclusive province of any one court or the other. So I do not anticipate that to be a difficult transition intellectually, and certainly expect that I will be up to the task.

Senator Heflin. Thank you.

Senator Specter, do you have any questions?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Specter. Yes, thank you, Mr. Chairman.

I had not introduced Judge Smith formally. You were not here at the start, but we had not had those introductions, and I would like to say just a word or two about him.

My colleague, Senator Heinz, is not here because he is in the State or he would be here, and I would ask unanimous consent for Senator Heinz to be able to add his statements as to all those present here today, when he returns, Mr. Chairman.

Senator HEFLIN. It will be so ordered.

[Statements follow:]

John Heinz

STATEMENT OF SENATOR JOHN HEINZ
BEFORE SENATE JUDICIARY COMMITTEE
NOMINATION OF JAY C. WALDMAN FOR
U.S. DISTRICT COURT FOR EASTERN DISTRICT
OF PENNSYLVANIA
NOMINATION OF D. BROOKS SMITH
U.S. DISTRICT COURT FOR WESTERN DISTRICT
OF PENNSYLVANIA
OCTOBER 4, 1988

Mr. Chairman, it is a privilege to join with my colleague, Senator Specter, to introduce to the Committee Judge Brooks Smith, the President's nominee for a current vacancy on the District Court for Western Pennsylvania, and Jay Waldman, the President's nominee for a current vacancy on the District Court for Eastern Pennsylvania.

Both of these nominees were first recommended by the bi-partisan judicial merit selection commission that Senator Specter and I established, and both have been favorably evaluated by the ABA.

By any measure, Judge Smith has had an extraordinary career -- as an attorney in private practice, as a county district attorney, and as a judge on the county court. In each of his positions, he has impressed those with whom he has worked with his intellect, integrity, and dedication.

From his position as managing partner of one of central-western Pennsylvania's largest law firms, he embarked on his career in public service. First, as an assistant district attorney in Blair County, he capped three years of service as special prosecutor for a grand jury investigation into organized crime activities.

In recognition of his outstanding work, the local Board of Judges appointed him District Attorney in 1983, and in 1984, then-Governor Dick Thornburgh nominated him for a vacancy on the county's Court of Common Pleas, making him the youngest judge in the history of Blair County.

In 1985, he received the nominations of both the Republican and Democratic Parties to serve a full ten year term on the court. And in July of last year, the Chief Justice of the Pennsylvania Supreme Court appointed Judge Smith the Administrative Judge for the Blair County Court.

In that capacity he resolved a criminal case backlog that had plagued the county court for more than ten years.

If Judge Smith had reached the mid-point of his legal career and could point to such accomplishments, we could all agree that his was a distinguished and very successsful record, and that he merited the consideration of this Committee for the position for which he has been nominated. As it is, Mr. Chairman, Judge Smith has achieved all of this and is still in the early stages of what promises to be an extraordinary career in public service.

Brooks Smith graduated from Franklin and Marshall College and the Dickinson School of Law in Pennsylvania, before returning to his hometown to practice law. In addition to all he has accomplished in his professional life, he has remained active in a host of civic and charitable organizations, ranging from the Salvation Army to the local domestic abuse program.

Brooks Smith is a person of exceptional abilities and energy. In my experience, perhaps no candidate for the federal bench has enjoyed such strong and consistent support from among those who are familiar with his work, no matter what their political affiliation or walk of life.

Although I have known Judge Smith for a relatively short period of time, I am strongly impressed with his integrity and his dedication to justice and public service. As an attorney in private practice, a prosecutor, and as a judge, he has demonstrated that he has the legal experience and judicial temperament for the position for which he has been nominated. I believe that he will be an outstanding addition to the Western District Court and urge the Committee to act favorably on his nomination.

Mr. Chairman, the second nominee that I would like to introduce to the Committee is a man I have known and worked with for nearly twenty years.

I first met Jay Waldman when he served as an able and aggressive assistant U.S. Attorney in Pittsburgh, working for then-U.S. Attorney Dick Thornburgh. During his five years in that office, he prosecuted a series of major cases in civil rights, white collar crime, and narcotics. And he was recognized on several occasions during that time by the Attorney General and the FBI for his achievements.

In 1975, he became Deputy Attorney General for the Criminal Division of the U.S. Justice Department, and he was among those who formed the core of the re-building at the Justice Department in the wake of Watergate.

In 1977, Jay left the Justice Department to direct Dick Thornburgh's successful campaign for Governor of Pennsylvania. After Governor Thornburgh's inauguration, Jay was appointed first Counsel to the Governor and then General Counsel for the Commonwealth of Pennsylvania. In this latter capacity, he supervised the activities of the more than 300 attorneys employed by the Commonwealth.

More to the point, however, Jay Waldman was from 1978 until 1986 the person who was most responsible at a staff level for the record of good management, honesty and integrity, and achievement that occurred under Governor Dick Thornburgh's leadership in Pennsylvania.

Jay Waldman earned his undergraduate and law degrees from the University of Wisconsin and the University of Pennsylvania School of Law. Since leaving state government, he has resumed the private practice of law as a partner in one of Philadelphia's most prestigious law firms.

Mr. Chairman, Jay Waldman, like Judge Brooks Smith, has devoted nearly his entire professional career to public service. As a prosecutor, an attorney in private practice, and as a public administrator, he has fashioned an exceptional record. He certainly has the requisite experience, intelligence, and dedication to be a distinguished judge on the Eastern District Court, and I congratulate the Committe for having this hearing to consider his nomination.

John Heinz

STATEMENT OF SENATOR JOHN HEINZ (R-PA)
BEFORE SENATE JUDICIARY COMMITTEE
NOMINATION OF JUDGE RICHARD NYGAARD
U.S. COURT OF APPEALS, THIRD CIRCUIT
OCTOBER 4, 1988

Mr. Chairman, last August 10 it was my privilege, along with my colleague, Senator Specter, to introduce to the Committee the President's nominee for a vacancy on the U.S. Court of Appeals for the Third Circuit, Judge Richard Nygaard of Erie, Pennsylvania.

At that earlier hearing, as part of my endorsement of Judge Nygaard's nomination, I recounted certain facets of his background and career that I believe bear positively on his nomination. I submit a written text of my August 10, 1988 testimony for inclusion in today's record.

Mr Chairman, rather than take up the Committee's valuable time by repeating all of the points I made earlier, simply permit me to reiterate my strong support for Judge Nygaard's nomination.

I am proud that his nomination results directly from his recommendation by the bi-partisan judicial merit selection commission that Senator Specter and I created. He is an asset to his neighbors in Erie County, both as a respected judge and as a leader in local charitable causes.

I thank the Committee for taking this step in the confirmation process and look forward to final action that will bring the Third Circuit Court to full strength by adding such a distinguished and well qualified person.

STATEMENT OF SENATOR JOHN HEINZ (R.PA)
BEFORE SENATE JUDICIARY COMMITTEE
NOMINATION OF JUDGE RICHARD NYGAARD
U.S. COURT OF APPEALS, THIRD CIRCUIT
AUGUST 10, 1988

Mr. Chairman, it is a privilege to join with my colleague, Senator Specter, to introduce to the Committee, Judge Richard Nygaard, the President's nominee to fill a current vacancy on the United States Court of Appeals for the Third Circuit.

Judge Nygaard has served on the Erie County Court of Common Pleas since 1980 when he was appointed by then Governor Richard Thornburgh and subsequently confirmed by the Pennsylvania Senate. In 1983, Judge Nygaard won election to a full 10-year term to the Common Pleas Court by receiving the nomination of both the Republican and Democratic parties in the Primary Election.

A graduate of the University of Michigan Law School, Judge Nygaard developed a specialization in bankruptcy law during his years of general practice. In 1977, Judge Nygaard was elected as a County Councilman from the Sixth Councilmanic District in Erie County, a position he held until his appointment as Judge of the Court of Common Pleas.

Mr. Chairman, over the past several years, Judge Nygaard has been recognized and honored for his unselfish commitment to his community. He has received the Multiple Sclerosis Award for Community Service (1984), the Erie County Grange Community Service Award of the Year for the elected official who made the greatest public service contribution (1983), and he was the recipient of Mayor Louis Tullio's celebrated Citizen Proclamation declaring Judge Nygaard Day in Erie (1982). In addition, he received the Erie Mayor's Certificate of Merit for Community Betterment Through Outstanding Judicial Performance (1982).

Judge Nygaard has not only been recognized locally. He was appointed by President Reagan in 1982 to be the only U.S. judge to serve as a delegate to the 35 nation International Conference on Free Elections, sponsored jointly by the U.S. State Department and the American Enterprise Institute.

In addition to serving with his wife Martha as the 1982 celebrity co-chairpersons of the Erie County March of Dimes, Judge Nygaard and Martha served as the 1980 co-chairpersons of the Erie Cerebral Palsy telethon, and the two of them stayed on television through all 24 hours of the National Cerebral Palsy Telethon.

Mr. Chairman, Judge Nygaard has arrived at this penultimate step to elevation to the federal appeals court through a personal history that is as American as apple pie:

First of all, he was born in Thief River Falls, Minn., which hardly sounds like a proper birthpalce for a judge.

But then, President Reagan's lastest nominee to Pennsylvania's only federal appeals court didn't arrive on the bench in the usual manner.

Along the way, Richard L. Nygaard was a shoeshine boy, soda jerk, paperboy, ranch hand, salesman, gas station attendant, carpenter, bus driver, librarian and truck driver.

As a Federal judge, Judge Nygaard certainly will bring, in additional to superb legal training, a first-hand familiarity with typical Americans.

Mr. Chairman, I want to note for the record that Judge Nygaard was first brought to the attention of the Justice Department by a bi-partisan merit selection commission established by Senator Specter and me. At that time, Judge Nygaard had been recognized by the Federal Judicial Nominating Commission as being among the very best appointment as a Federal District Judge.

Mr. Chairman, Judge Nygaard possesses the legal experience and judicial temperament required for appointment to the federal judiciary, and he is more than capable of assuming the responsibilities for which the President has nominated him. I thank the Committee for acting so expeditiously on Judge Nygaard's nomination to the United States Court of Appeals for the Third Circuit.

Senator **Specter**. Judge Smith is an unusually-qualified young man, and I would emphasize all of those words: "unusually," "well," "qualified" and "young." He is 37 years old. He has an excellent academic background. He practiced law with a firm headed by the Hon. Robert Jubelirer, who is the President Pro Tempore of the Pennsylvania State Senate. And he has served as District Attorney of Blair County and has served on the Common Pleas Court since 1984. So he brings really remarkable credentials to the Bench for a man who is as young as he.

Mr. Chairman, I would ask unanimous consent that a letter from Congressman Bud Shuster be entered in the record, endorsing Judge Smith.

Senator **Heflin**. So ordered.

[Document follows:]

Congreſs of the United States
House of Representatives
Washington, DC 20515

October 4, 1988

The Honorable Joseph Biden
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

Today I have the distinct honor of endorsing the nomination of Judge D. Brooks Smith to be U.S. District Judge for the Western District of Pennsylvania. For eight years Judge Smith acted as a vigorous and skilled prosecutor while serving the people of Blair County as their Assistant District Attorney and then as District Attorney. Since his confirmation as Blair County Judge of Common Pleas he has distinguished himself as a man of great integrity and character.

Through our association of many years, I have always known Judge Smith to be an outstanding public servant and a man of extraordinary conviction. Judge Smith is a great American. It is, therefore, with great sincerity and enthusiasm that I recommend his nomination without reservation and urge his swift confirmation.

With kindest regards, I remain.

Sincerely,

Bud Shuster

BUD SHUSTER
MEMBER OF CONGRESS

EGS:jef

Senator SPECTER. And the comment that Judge Smith has made about his interest in trying to open up the clubs, I think is a commendable one—much preferable than a decision to resign from clubs. I have always wondered, when resignations are tendered in the face of an objection or concern by the committee, what real validity or value it has in assessing a person who did not resign in advance, but resigns after the fact. I do not know that it is a disqualification in any event, but I have never understood a positive advance by way of resignation. But I do see something very positive in taking a stand to try to open a club to women, to blacks, to Jews, so that there is not a disqualification.

This is a matter on which many people differ, and as I say, I think it is a factor, not necessarily a disqualifier. I prefer not to see it, but the resignation has never made very much to me, but a stand to change does have some significance.

I am delighted to see Judge Smith come to the Federal Bench, assuming his confirmation, for many reasons. One of them is the opening of a satellite court in Johnstown, Pennsylvania.

This Senator and my colleague, Senator Heinz, and others including the Congressmen in the area, Congressman Shuster and Congressman Murtha, have been interested to have this satellite court. It is simply stated too far for people to have to drive from Altoona for almost 3 hours to go to Pittsburgh to have their Federal cases heard, or from Johnstown, about 2 hours. It is just not right.

We have had satellite courts in the eastern district, at Allentown and at Reading, for some time, and we are trying to put everything in order, and I think to accomplish it, it requires having a judge from the locale—a judge who lives there, a judge who is concerned about the locale, and a judge who finds it "convenient" may not be the right word, but it may not be the wrong word, either, to sit in the area.

I have talked to the chief judge of the third circuit, and I have talked to the chief judge of the western district, and I think we are set to have this court. I worked on the appropriations, where I serve on the Appropriations Committee and on the Judiciary Committee.

My only question to you, Judge Smith, is to just confirm the conversations that you and I have had about your interest in and willingness to serve on that satellite court, to see to it that people can have the availability of the Federal court if they choose to avail themselves of it.

Judge SMITH. I would be delighted to do so, Senator, and I am certainly most hopeful that it will come to reality.

Senator SPECTER. I thank you very much, Judge Smith, and I thank you, Mr. Chairman.

Senator HEFLIN. Thank you.

You can be excused, Judge. Mr. Waldman——

Senator SPECTER. Excuse me, Mr. Chairman. Senator Thurmond had a question and asked if he could be given an opportunity to comment.

Senator HEFLIN. I thought you said he was uncontroversial.

Senator SPECTER. Senator Thurmond has been known to make noncontroversial comments.

Senator **Thurmond**. Judge, I just want to make this point to you. I am very interested in judicial activism. I have seen judges take over schools, prisons, hospitals, and State institutions, and I really do not know of any authority for that. They are simply usurping authority that they do not have. And I want to know how you feel about these things.

We have three branches of Government. The Congress makes the law. The executive branch administers the law. The judicial branch interprets the law. How do you feel about those matters?

Judge **Smith**. I certainly agree with the Senator's analysis of the role of each of the three branches of Government. I am not a judge and have not been a judge who has reached out and tried to grab and resolve issues that were not directly before me. I have believed my role as a State court judge and would believe my role as a member of the Federal Judiciary to be one of interpreting and construing the law.

I am very, very much aware of the fact that members of the Federal Judiciary are unelected members of the Government. They are as Federal judges lifetime, unelected authorities, and therefore, have a very different background and a very different perspective and a very different role in the administration of public policy. And that, I believe, is a factor which every judge should bear in mind as he or she seeks to interpret the law and interpret the law and apply it only.

Senator **Thurmond**. You have a fine record so far as I have been able to determine. I will be very pleased to support your nomination, and I congratulate you on your selection. I have heard Senator Specter speak highly of you, too, and he is a member of this committee and a very fine man.

Is that lady sitting in back of you your daughter?

Judge **Smith**. No. Thank you for the compliment, Senator, but she is my wife.

Senator **Thurmond**. Is she. Well, you did like I did—you married a young, pretty girl. [Laughter.]

Thank you very much.

Judge **Smith**. Thank you, and I thank you on behalf of my wife, Senator.

Senator **Specter**. Mr. Chairman, Senator Thurmond has not given his customary admonition, which I sometimes give the Thurmond admonition if he doesn't. I never do it before he has a chance. But both Judge Smith and Mr. Waldman are present, and I think it is a very important thing to have said.

I heard Senator Thurmond say this many years ago, about the importance of being courteous. I heard Senator Thurmond ask some nominees from Pennsylvania if they promised to be courteous when they were judges, and I thought, of course they are going to say yes, and of course, they did say yes. Then Senator Thurmond said that that is very important, that the more power a person has, the more courteous they should be. And I think that is an admonition of tremendous importance to everybody, but especially Federal judges.

Unlike Senators, who have to run for re-election and have some reins on them, Federal judges do not. And I have seen many Federal judges who do not follow the Thurmond guidelines, and I wanted to call it to your attention as forcefully, albeit briefly, as I could.

Judge SMITH. Thank you very much, Senator.

Senator HEFLIN. Thank you, sir.

Judge SMITH. Thank you, Mr. Chairman.

Senator HEFLIN. We now call Mr. Waldman.

Do you solemnly swear that the testimony you give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. WALDMAN. I do, Senator.

Senator HEFLIN. Will you have a seat, please.

Senator Specter, would you like to introduce Mr. Waldman?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. I would, Mr. Chairman. I thank you.

[Pause.]

Senator HEFLIN. You've got so many Pennsylvania judges coming around, you can't get your papers straightened out over there, can you. It is Pennsylvania Day today, I believe.

Senator SPECTER. I was reading some of your Floor statements, Senator Heflin, while I was awaiting my opportunities here.

Senator HEFLIN. They obviously were brief.

Senator THURMOND. It doesn't hurt to be a member of this committee, does it?

Senator SPECTER. It is true that Pennsylvania has three nominees—we are going to have a fourth tomorrow, after I have a chance to confer with Senator Thurmond and others. Of our 12 million people, we have a lot of litigation, and it does help to be a member of this committee, too.

I am delighted to present Hon. Jay C. Waldman, who has served very extensively in Government, is now in private practice; a man whom I have known personally for at least the past 10 years and can testify personally as to his integrity and capability.

Mr. Waldman has an outstanding career. He is a graduate of Wisconsin University and later the University of Pennsylvania Law School in 1969. He clerked for a judge for a year, then was in practice with a big firm in Pittsburgh, and then became an assistant U.S. attorney in 1971 and served in that capacity, under then U.S. Attorney Dick Thornburgh, and came with now Attorney General Thornburgh to the Justice Department in 1975 and has been closely associated with now Attorney General Thornburgh upon his 8 years in office as Governor and has handled some of the toughest problems including being at the Governor's side on Three-Mile Island.

Mr. Waldman is now in the practice of law with a very distinguished firm in Philadelphia, Dilworth, Paxson, Kalish & Kauffman.

He has extensive experience as a trial lawyer. His résumé has been presented to the committee. He has two appearances that I know of before the Supreme Court of the United States. He has an extraordinary background, having been in Government and having seen so many problems first-hand, and I think he will make an outstanding addition to a very outstanding court, the Federal District Court in Philadelphia.

Thank you, Mr. Chairman.

Senator Heflin. All right. Mr. Waldman, you were an active litigator in Federal court while you were in the U.S. Attorney's Office in Pittsburgh, but your questionnaire indicates that you did not appear in court during 1976 and 1985 and that you have appeared only occasionally since 1986.

Will your lack of courtroom experience in the past dozen years be a handicap to you in carrying out the duties of a U.S. district judge? How do you plan to overcome it?

TESTIMONY OF JAY C. WALDMAN, PHILADELPHIA, PA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Mr. Waldman. Senator, I don't believe it would be a handicap. I would respond to you this way. The Rules of Evidence and Procedure have not changed terribly much. I learned when I did go back to private practice, somewhat to my surprise, that I had tried more jury cases to conclusion than all but one or two of the most senior partners in the litigation department of our law firm.

After returning to private practice, I did resume an active litigation practice. I must say that, given the general nature and flow of civil litigation, however, most of these matters are in the motion stage or the discovery stage. But I have felt very comfortable in representing major clients in complex litigation over the past 2 years, and they appear to feel comfortable with having me do that.

I would add just one thing, Senator, that while I was counsel to the Governor for 8 years, I did not appear in court with the exception of the U.S. Supreme ~~Court~~ appearance, but I was quite actively involved with developing litigation strategy and in some cases, personally involved in the drafting of briefs in the Federal courts on issues and cases of extreme importance to the administration.

Senator Heflin. Senator Thurmond asked the last nominee about judicial temperament, and we all know that a Federal judge has enormous powers. What are your thoughts on the temperament and the demeanor that a district judge should display? Are you confident you can measure up to this important standard?

Mr. Waldman. Yes, sir, I certainly hope so. I think patience, perhaps, along with courtesy, as Senator Thurmond indicates, is a valuable trait. I think that you owe it to each side and each party to have a full and fair hearing, and you want people to feel when they have left that they have had that opportunity. I think that the role of a judge is by and large that of an umpire. It is to see that the rules are fairly enforced and that a case proceeds on the law and the evidence as it should. And I think the judge should intervene only when it is absolutely necessary to keep the case flowing or to see that justice in the course of that case is done.

Senator Heflin. Let me ask you about a question that has been raised in news reports. As a general counsel for the Commonwealth of Pennsylvania, a position you held for about 5 years, you had the duty of appointing private law firms to represent the Commonwealth in certain cases. In that capacity, you hired the Philadelphia firm of Dilworth Paxson in litigation arising from delays in the construction of the Convention Center in Pittsburgh. In this regard, the case, I believe, was settled. Did you consider that to be favorable to the Commonwealth of Pennsylvania?

Mr. **WALDMAN**. Yes, sir, your statement is quite correct. We did appoint on occasion outside law firms to handle major cases where we did not have the capacity in-house, or where we needed some particular expertise that you really just could not afford in the public sector in-house. I believe in any given year, legal fees being what they are, we probably expended anywhere from six or seven to ten million dollars on a variety of counsel. I believe during my tenure, Senator, we appointed 41 different firms to handle a wide variety of matters. We did appoint that firm in—I went back and looked it up—I believe it is November of 1981—to represent the Commonwealth in some very complex construction delay claim litigation.

I believe, Senator, the amount at risk was $35½ million. And indeed, they achieved, after about 3½ or 3¾ years, a result that I think was excellent, and it appears to have been excellent enough that Governor Thornburgh's successor, a member of the other party, saw fit to retain the firm to handle some ancillary and related litigation.

Senator **HEFLIN**. There has been a news report that this firm received about $1.9 million in regard to the case that I asked you about. In April of 1986, it was announced that you would leave State Government to become a partner with the Dilworth Paxson firm. A decision of this sort is not usually made overnight. Tell me when you began to discuss with the Dilworth Paxson firm the possibility of leaving State Government to join the firm.

Mr. **WALDMAN**. Senator, the appointment, as I indicated, was made in November of 1981. The first serious conversations—I guess I might say this to you. I talked to no firm about going into private practice at the end of Governor Thornburgh's term that did not first approach me. The chairman of that firm did approach me and express an interest in having me consider that firm if and when I returned to private practice, presumably toward the end of Governor Thornburgh's second term. The first serious discussion that we had would have been in 1985, and since you asked the question, I hope and don't think that the chairman of that firm would be upset if I were to say that my original inclination was, despite my very high regard for him and the firm, was to not go to that firm, but rather go to another firm. But I ended up changing my mind a couple months later and did go with that firm.

Senator **HEFLIN**. Well, during your negotiations with Dilworth Paxson, which I suppose went on over a period of some months, did the fact that you had made the decision to appoint that firm to represent the Commonwealth, an appointment which resulted in revenues to the firm of at least $1 to $2 million, ever come up in the discussion?

Mr. **WALDMAN**. No, sir, and I might add I believe the amount was $1.1 million, Senator, but it was paid over a 4-year period in monthly installments. The annual amount represents an infinitesimal fraction of the State's business and an infinitesimal fraction of the firm's annual gross income. And I think if they were going to seek out partners based on that, we'd probably have a couple thousand partners now.

Senator HEFLIN. In light of these facts, do you perceive any impropriety or the appearance of any impropriety in your decision to join Dilworth Paxson after having made the decision that led the Commonwealth to pay this firm substantial amounts in legal fees?

Mr. WALDMAN. No, sir. As I indicated, 5 years had elapsed between the first event and the second; and also, as I indicated, where we had the need for outside counsel, with rare exception we tried to appoint firms from within the State. And during the course of my tenure, we appointed 41 firms to handle a wide variety of matters. In almost every case, Senator, these were the largest, most distinguished and prestigious firms in the State. Never once, without exception, never once did anyone question their qualifications. And it would have been difficult really, if I had wanted to stay in the State, to have gone anywhere where somebody couldn't have perhaps raised that question.

Senator HEFLIN. I do not think there is any reason to question your decision to appoint Dilworth Paxson to represent the State as there is also nothing improper about a lawyer leaving State Government to represent a prominent firm in the State. The question is whether the conjunction of these two events creates any appearance of impropriety and whether such an appearance should have been avoided.

Mr. WALDMAN. Well, I hope it doesn't, Senator. No one made a finding to that effect. As I say, a period of roughly 5 years elapsed between the one event and the other. And I think it would have been very difficult to find any large, prestigious firm of the type that you would want to practice with that had not represented us at one time or another.

Senator HEFLIN. Thank you.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Waldman, you must have a very good record. Judge Tyler from New York called me about you; and the Attorney General of the United States spoke to me about you; and Senator Specter has just spoken nicely about you.

Senator SPECTER. How many times, Senator Thurmond?

Senator THURMOND. I don't know how many. You just keep on and on. That's why you've got so many Pennsylvania judges.

Senator HEFLIN. It sounds like you are a pretty good Republican. [Laughter.]

Senator THURMOND. At any rate, you seem to have a fine record. I just want to ask you one question.

Mr. WALDMAN. Yes, sir.

Senator THURMOND. And this is a pretty tough question about stare decisis. Suppose you had a matter where there seemed to be a conflict in your mind concerning a case that had been decided by the circuit court, say, on stare decisis, and yet you felt the Constitution construed otherwise. What would you do?

Mr. WALDMAN. Senator, if it were the circuit court in which I were sitting—this would be the third circuit court in our case—I would feel bound to follow the law as handed down by that court if indeed it applied to the case before me. On the other hand, if I had a conviction that it required an unconstitutional result, I suspect I would at least entertain the thought of noting that in some way. But I might make clear I felt compelled to follow the law, while I myself had some questions about it. But I would feel compelled, certainly, to follow the law as handed down by any higher court.

Senator THURMOND. I have heard different candidates analyze that and answer in different ways. It is really a matter of opinion, I guess, as to which way they could go; they could go either way, I presume. But I think probably your analysis of it, if it is the circuit court in your circuit, if you are in that circuit, you would feel bound by that court until they had reversed themselves. If it is not in that circuit, though, you would not necessarily feel bound to that extent. Is that what you are saying?

Mr. WALDMAN. That is correct, yes, sir. Yes, I am, sir.

Senator THURMOND. I don't think I have any other questions. You seem to have a good record, and I will be glad to support you.

Mr. WALDMAN. Thank you very much, Senator.

The CHAIRMAN. I understand, Mr. Waldman, that Senator Heflin has covered that area that I wished to cover, but I'd like a clarification on the answer you just gave on stare decisis. You said if you were a circuit court judge?

Mr. WALDMAN. No, sir. What I meant to say was if the circuit court in the circuit in which I am sitting—in my case, it would be the third circuit—were to have an opinion, on point, I would feel obligated to follow that opinion even if I personally thought they had reached the wrong result.

As a district court judge, I think you are bound, at least in my view——

The CHAIRMAN. But if there were differing positions at the circuit level on the case on point, you would not feel bound if they were outside of your circuit, those differing views.

Mr. WALDMAN. I would certainly regard them, Senator, as substantial authority that ought to receive some serious weight. But given Senator Thurmond's hypothetical, if I thought that to follow the ruling of a court from another circuit than the one I sat in would lead to an unconstitutional result, I would be reluctant to do so.

The CHAIRMAN. How about a Supreme Court decision?

Mr. WALDMAN. I would feel absolutely bound to follow the law as set down by the U.S. Supreme Court on any matter before me to which it was applicable.

The CHAIRMAN. Whether or not you thought it was an unconstitutional decision?

Mr. WALDMAN. Yes, sir.

The CHAIRMAN. Has the temperament issue been raised?

Senator THURMOND. Yes. Judge Heflin asked about the judicial temperament, so I didn't ask him about it.

The CHAIRMAN. How long were you an administrative assistant to the Governor?

Mr. WALDMAN. I was counsel to the Governor from roughly 1979 to 1986.

The CHAIRMAN. Did the way in which you handled people petitioning for the Governor's time and seeking a particular outcome from the Governor, did the way you handled them change over that period? Were you any different in 1986 than you were in 1979?

Mr. **Waldman**. Well, I think, Senator, that as time goes on, you grow both more weary and more patient, so I think I probably developed a greater sense of priority-and patience—although I must say there were a handful of us who consulted and advised the Governor and did his bidding, and there were many, many thousands more people who, as you put it, were petitioning us with one desire or another. And you sometimes felt that you were at the narrow end of a very large funnel. And I think that properly most of the complaints that we would get, Senator, were from people who, as important as their problem may be, or it may have been to them, found that because we had so many other important problems to deal with, we perhaps could not give them the time they wanted, or perhaps they couldn't get a meeting at the level that they thought they wanted. But we did our best to accommodate as many——

The **Chairman**. What is the role of the "Governor's counsel"? What does that mean? You say you are the "Governor's counsel"; what does that mean?

Mr. **Waldman**. Well, in my case, Senator, I provided the Governor with legal, policy and legislative advice; I reviewed legislation for constitutionality——

The **Chairman**. Were you the guy people had to go to get to the Governor? Were you the last stop on the way?

Mr. **Waldman**. No, sir, although perhaps some people thought seeing me was worthwhile enough that they got the idea that to see me was perhaps the next best thing to seeing the Governor. But no, we had an administrative assistant who handled the scheduling and all matters related to that.

The **Chairman**. If you were trying to see the Governor, who would you go to—the counsel or the administrative assistant?

Mr. **Waldman**. Well, you would go to Jim Syfe—you would go to the administrative assistant. If you went to someone else, you certainly would have been referred to the administrative assistant.

The **Chairman**. Was there any time during that long period, some of which I am sure was trying, that you lost your temper with any of the people who were coming to you to see the Governor?

Mr. **Waldman**. I think it was very rare, Senator. I think if you asked Governor Thornburgh, I think he'd tell you that one of my virtues, few that they may be, is that I was a pretty patient fellow. In fact, he would comment to me at times that he thought my patience exceeded that of his in certain situations.

The **Chairman**. That's why we hire people like that.

Mr. **Waldman**. Well, I don't have to tell the Senator that Government can be exasperating at times, but I think we maintained our patience pretty well.

The **Chairman**. How do you respond to the phrase—I am sure you haven't heard for the first time—that you were "Thornburgh's hatchet man"?

Mr. **Waldman**. Well, there were several of us who would be referred to in terms like that from time to time, Mr. Chairman. I don't think there is any question that at times we were lightning rods for Governor Thornburgh, and willingly so, and I think he would confirm that. But generally as I reflect back, Senator, I think that when you are part of a process where you stand at the intersection between so many people and their wishes or claims or demands, and some percentage of them are frustrated and cannot be granted, over time, no matter how you try to explain the merits to them, "x" percentage of people get mad, get upset at you and call you names.

The CHAIRMAN. Well, one of the most important things to me, and I'm sure to my colleagues, in deciding whether or not we affirmatively vote to put someone on the Federal Bench, is their temperament. And on the one hand, I have heard negative reports about your temperament; on the other hand, knowing the job, and knowing what the counterpart in my office has to do, which is in a sense less troublesome than that of a Governor's, I think, because you have every qualified person and every deadbeat in the State, concluding that they should be everything from the Attorney General to that job that pays $15,000 a year that their brother-in-law has, coming before you, that I am prepared to not dismiss them, but hope that when you did not demonstrate proper temperament, if you did not, it was with some good cause.

I have no further questions. Does anyone else have any questions?

Senator SPECTER. Mr. Chairman, I would just make the same comment, although Mr. Waldman was in the room before, following up on your comment on temperament, and I commented about Senator Thurmond's statement about courtesy. I think that is one that cannot be emphasized too much, for those of us who have practiced law and have seen Federal judges who are not courteous, who do not let lawyers try cases and who are overbearing. And there are constraints on Senators. The fact that we have to run every 6 years is a great constraint. And if you have a lifetime appointment, it is very difficult. And a lifetime appointment for someone who is 44 is a long time.

I like to think about Senator Thurmond's comment, and I would hope that all the nominees who come before this panel, especially people from Pennsylvania, whom Senator Heinz and I have recommended, would be very, very thoughtful at all times about courtesy and about treating people nicely in their courts, because there is nobody in our system who has as much authority as a Federal judge and nobody who exercises as often as the Federal district judge.

So I would hope that you, Mr. Waldman, and all Federal appointees, especially those in Pennsylvania, would remember that every time there is somebody before you where you are tempted to be authoritarian or arrogant or lose your temper.

The CHAIRMAN. And there is no aspect of your job you can more often and easily abuse without being able to be directly reviewed than that. Well, I don't have any further questions.

Thank you very much, Mr. Waldman.

Mr. WALDMAN. Thank you very much.

The CHAIRMAN. We do have one more important nominee who is not from Pennsylvania. I'd like to ask Judge Robert Jordan to come forward, Chancellor Jordan in his present capacity.

Robert Jordan was nominated to the Eastern District——

Senator **Thurmond**. Excuse me, Mr. Chairman. I see Rudolph Guiliani, the U.S. Attorney for the Southern District of New York is here; and also, Mr. Steve Markman, Assistant Attorney General, Office of Legal Policy.

The **Chairman**. I was assuming they were here to serve an indictment on somebody, and I didn't see anybody move, so I am wondering why he was here and why he left so quickly.

Senator **Thurmond**. I just wanted to call attention to their presence here.

The **Chairman**. Thank you very much. I kept an eye on them to see who they were looking at.

Mr. Jordan, do you swear to tell the truth, the whole truth, and nothing but the truth?

Mr. **Jordan**. I do, Senator.

The **Chairman**. Thank you.

TESTIMONY OF HON. ROBERT JORDAN, WOODLAWN, TN, NOMINATED TO BE U.S DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE

The **Chairman**. Do you have any family or friends present?

Mr. **Jordan**. Yes, sir.

The **Chairman**. Would you please introduce them?

Mr. **Jordan**. I have with me my wife, Dottie.

The **Chairman**. Welcome, Mrs. Jordan.

Mr. **Jordan**. And my sister-in-law and brother-in-law.

The **Chairman**. We are pleased to have you both. You are very gracious to take the time to come, and we have trespassed on your time a great deal here. The reason for going last bears no relationship to importance or merit. It just happened to be the bad luck of the draw for all of you. But we appreciate your being here.

Mr. Jordan, according to your responses to the committee's questionnaire, approximately 10 percent of the cases that you handled when you were in private practice were Federal court matters, including bankruptcy. Additionally, you have indicated that you have not rendered any significant opinions on Federal or State constitutional issues since you have been a judge.

Do you view this as representing a lack of experience? To show you how my staff views this thing, they write: "Do you view this lack of experience?" Do you view it as a lack of experience in only 10 percent of the cases?

Mr. **Jordan**. No, sir.

The **Chairman**. Do you view the fact that you have not rendered any significant opinions on Federal or State constitutional issues as representing a lack of experience?

Mr. **Jordan**. Well, there have been a number of issues of State of Tennessee constitutional issues that I have rendered opinions on. One of the most recent ones concerned the statutes of Tennessee, requiring that all medical experts who testify in our State courts in malpractice cases be from contiguous States to Tennessee. I wrote an opinion upholding that law, and that is the published opinion.

The **Chairman**. I am going to ask you to describe for the record, meaning today, some of the cases you tried in Federal court during your years in private practice. Can you recall any of them for us right now?

Mr. JORDAN. Yes, sir. One of the first ones was as a freshman attorney. It is listed in the list of ten most important cases that I have tried. That case involved a lady who was seriously injured in an automobile accident on U.S. 79 in Stewart County, TN. We represented the construction company that was constructing the highway. The plaintiff suffered severe injuries as far as actually left to be carried upon a stretcher into the courtroom.

The case was tried in the U.S. District Court for the Middle District of Tennessee and resulted in a hung jury in favor of the plaintiff. I joined the law firm, was advised of the severity of the lawsuit, was asked to conduct a further investigation of the accident, which I did. I spent a considerable length of time investigating, which resulted in my finding a number of witnesses who could testify in the case.

We tried the case again, resulting in a defendant's verdict. We were very pleased with that case. It was then appealed in the sixth circuit, and the judgment was affirmed.

The CHAIRMAN. Have you had much criminal experience?

Mr. JORDAN. Not as a judge.

The CHAIRMAN. How about as an attorney?

Mr. JORDAN. Yes, I have had some. I have defended people charged with murder. I have helped defend a rapist. I have represented moonshiners in the U.S district court.

The CHAIRMAN. Were they cases assigned to you, or were they cases——

Mr. JORDAN. Yes, appointed.

The CHAIRMAN. How will you prepare yourself for what will obviously be a significant increase in the number of cases involved in criminal litigation? Do you think you have to do anything to prepare yourself?

Mr. JORDAN. Very definitely, I'd feel like that I would need to study, Mr. Chairman, and I would attend and make every effort to attend any judicial education, continuing legal education program that the system provides, to update myself on the Federal system and criminal court.

The CHAIRMAN. Under what circumstances, if any, would a litigant's religious beliefs or practices be relevant to your decision in a case that may come before you in a Federal court.

Mr. JORDAN. None, Senator.

The CHAIRMAN. If there was a conflict between your religious views, if you were to encounter one as a Federal judge, between the constitutionality or statutory requirements that existed and your religious principles, how would you resolve that?

Mr. JORDAN. I would have to follow the law, Mr. Chairman.

The CHAIRMAN. There is an article from the Kingsport Times News. Do you know of that paper?

Mr. JORDAN. Yes, sir.

The CHAIRMAN. Is it considered a reputable paper?

Mr. JORDAN. It does a pretty good business in upper east Tennessee.

The CHAIRMAN. There is a report that they had on May 12, 1988, page 1A. It says: "A Report Card: Jordan Uses Law, Religion. Eleventh in a Series by Alison Mechem." I'd like to quote a few things from that article.

It says: "A generally positive score for impartiality was tempered by comments by some about what they perceived as undue weight the judge gives to religious tendencies of the people in his court." Going on, it says that, "Jordan offers this parable to illustrate how he reconciles his faith and his work: There was a man brought before me and he had not paid his child support. I was explaining to him what the law required, that the Federal law required it, the State law required it, and God's law required it. I said, 'By the way, do you know what the Bible says about a man who does not take care and support his family? The scripture says he is worse than an infidel.' The man asked me, 'What is an infidel?' I said, 'Sheriff, take him away.' "

Further in the article you are quoted as saying: "I try with every case to remember that even though this case may not have a great amount of money involved in it or be of great magnitude either in fact or in law, it is still the most important case in the world to the person, because it is the only one he's got," Jordan said. "Most people have just got one day in court, and I think they ought to feel like they have been treated fairly and justly," which has been quoted by my colleagues.

Then, further in the article, it says; "A handful of attorneys said they think Jordan keeps cases under advisement too long, but Jordan said it is often a matter of cases being presented in pieces or over a period of time as you are moving along."

The reason I read the rest is there is some good and some controversial that is stated. Let me move back to the quote attributed to you. "By the way, do you know what the Bible says about the man who does not take care and support his family? The scripture says he is worse than an infidel. The man asked me, 'What was an infidel?' and I said, 'Sheriff, take him away'."

Could you explain what you mean if you said that and what you mean by all that?

Mr. **Jordan**. I said that, Mr. Chairman.

The **Chairman**. What did you mean by it?

Mr. **Jordan**. I meant that I was not getting through to the individual. I asked him specifically did he understand the Federal law—this is title 4(d), support money. That did not impress him. I asked him if he understood the——

Senator **Thurmond**. Speak a little louder. We can hardly hear you.

The **Chairman**. Yes. Why don't you pull the microphone closer to you?

Mr. **Jordan**. Thank you, sir.

I asked him if he understood the State law, which required him to pay it under penalty of being placed in jail. He didn't respond. We live in that area and what is known as the "Bible belt," so I asked him if he understood God's law relative to the duty of support of his family. He did not respond. So the only thing left under our law—that is, the law of Tennessee—he, failing to respond in any manner and failing to support his family, was to place the man in jail for contempt.

The CHAIRMAN. Let me make sure I understand this in what I would view as its most positive light.

Mr. JORDAN. All right.

The CHAIRMAN. You were trying to get through to the man. You used the Federal law as a means, and he didn't understand; the State law; and then you used the Bible, because you thought he may——

Mr. JORDAN. Identify with that.

The CHAIRMAN [continuing]. Identify with that—not because you thought it was important that someone identify with that or not identify with that?

Mr. JORDAN. That's correct.

The CHAIRMAN. So in a Federal court, as a Federal district court judge, would you think it appropriate to ask a man or a woman before you whether or not they believed or understood what the Bible said?

Mr. JORDAN. If that was not an issue in the matter, it would not be an appropriate question.

The CHAIRMAN. Can you think of any case where it would be an issue, whether or not they believed or didn't believe what the Bible said?

Mr. JORDAN. Yes, a very recent case in Greenville, TN, U.S. District Court for the Eastern District, relative to the school textbook issue.

The CHAIRMAN. I see. You can assure this committee that whether or not a person believed that the Bible was the revealed word of God, or thought that the Bible was one big fairy tale, cooked up by some con man, regardless to whether they believed either end of that, that would have no bearing on how you would hold in a case or how you would sentence in a case; is that what you are telling this committee?

Mr. JORDAN. Absolutely. The only issue that would have would be whether he would take the oath under pains and penalty of perjury or whether he took the Bible oath.

The CHAIRMAN. If he took it by swearing on the Bible, how would it be relevant then?

Mr. JORDAN. It's absolutely none under the Federal system. He either takes the oath by affirmation, or he takes the standard oath, which is construed in Tennessee as the Bible oath, so help you God, the same one I answer to.

The CHAIRMAN. I have no further questions.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Jordan, I want to congratulate you upon your selection by the President, and also having both Senators to endorse you, Senator Sasser and Senator Gore, both of whom happen to be Democrats. So you are appointed by a Republican President, you have been approved by the two Democratic Senators.

In this same article that the distinguished chairman referred to, I noticed the members of the Washington County Bar generally responded that they were satisfied with your work. You don't know of any special dissatisfaction, do you, among your Bar?

Mr. JORDAN. No, sir.

Senator THURMOND. Also, it is stated here about your "positive scope for impartiality," which is very important in my mind, being fair and fair to everybody. A judge has to be fearless, he has to be fair.

You have already heard the talk here about judicial temperament; there is no use to repeat that. I presume you feel you can be humble and courteous in the office if you are confirmed by the Senate.

Mr. JORDAN. Absolutely.

Senator THURMOND. In general, looking over your record, you appear to have a fine record, and I will be glad to support your nomination.

Mr. JORDAN. Thank you, sir.

The CHAIRMAN. Thank you, Senator.

I have one more question. If you are confirmed as a Federal judge, Chancellor, would you plan to follow a particular timetable on ruling on matters under advisement?

As you know, the Administrative Office of the United States Courts requires judges to report quarterly all cases they have held under advisement for more than 60 days. What would be your—you are required to report; it doesn't require they cannot.

Mr. JORDAN. Absolutely.

The CHAIRMAN. Would you tell us, whether or not if you are confirmed, what particular timetable you would follow, if there is one, on cases you would be willing to take under advisement?

Mr. JORDAN. What we hope we'll be able to do, Mr. Chairman, is go to Knoxville and go to work and complete the task down there. The situation I was confronted with in Tennessee as I became a Chancellor was a tremendous backlog of cases in five counties, a total of eight different courthouses, which required me to go to each one of those courthouses and to hold court over a given term. In order to accomplish that, many times, we had to leave cases incomplete, which was unfortunate.

I do not think I will be faced with that predicament in the Federal judicial system.

The CHAIRMAN. Well, I would sincerely hope you will make every effort not to be faced with that, because quite frankly, Senator Thurmond and I are repeatedly confronted, when he was Chair and now, since I have been Chair, with an increasingly and never-ending request by the Federal Bench for more judges.

We are at the point that I am not at all certain that we are not going to make or cause or push for changes in everything from the discovery that is available to other changes before we are willing to go forward with a whole new group of judges.

One of the things you can help most doing if you are confirmed—and I believe you will be—is understand, as I am sure you do now as a Chancellor, that unlike other positions you have held, notwithstanding the fact this one is for life, we expect and hope you will do everything reasonably possible to keep up with the docket and keep it as clear as you can.

Mr. JORDAN. Thank you, Mr. Chairman.

The CHAIRMAN. I thank you very much.

There are no other witnesses. These hearings are adjourned, and thank you for waiting.

[Whereupon, at 1:15 p.m., the committee was adjourned.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name(include any former names used.)**

   Richard Lowell Nygaard.

2. **Address: List current place of residence and office.**

   Residence-59 Gibson Street, North East, PA 16428
   Office-Judge's Chambers, Erie County Court House,
   Erie, PA 16501

3. **Date and place of birth:**

   July 9, 1940, Thief River Falls, Minnesota.

4. **Marital Status: List maiden name of wife (or husband's name). List spouse's occupation, employer's name and business address.**

   Married to Martha Jean (Marks) Nygaard, housewife.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   University of Michigan Law School - Juris Doctorate, August, 1969 - December, 1971.

   University of Southern California - Bachelor of Science, Cum Laude, in Public Administration, September, 1964 - June, 1969.

   East Los Angeles College - No degree, 1964-1965.

   University of California (correspondence course) no degree, 1964-1965.

   Antelope Valley College- No degree, 1963-1964.

I attended colleges C,D and E above to correct deficiencies in my high school records so that I could be admitted to the University of Southern California. During the time I went to high school, I was a very poor student and permitted to graduate only because the principal thought I would not be going to college. When I returned from the U.S. Navy, I decided I would go to college, hence it was necessary to attend several Junior Colleges to correct these deficiencies.

6. Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

December, 1971-March, 1981. Partner in Orton, Nygaard and Dunlavey, 33 East Main Street, North East, PA 16428.

May, 1981-present, Judge of the Court of Common Pleas of Pennsylvania, Sixth Judicial District, Erie, Pennsylvania.

1984-1985-Pennsylvania State University, Behrend Campus. Lecturer, "American Legal Systems" and "Constitutional Law".

Because of the wide range of my previous occupations and because I believe my work experience made a significant contribution to my abilities as a jurist, I have also included the following occupational history, dating back to when I first began work at the age of 11.

I came from a poor family and was encouraged to begin work early, first shovelling snow in the winter and selling papers in the summer. At the age of 11, I began my first job that involved working for another person--shining shoes in a barber shop, where I also swept floors, etc. This was one of my most significant jobs. It was in the barber shop that I learned how to please others; how to discuss issues and events, and what it's like to hustle a buck.

I worked in the barber shop for two years. From there I went to work on a paper route, in a chicken hatchery, a ceramic studio, a soda shop and various other restaurants. In my junior year of high school I began working nights loading chickens and turkeys and summers on various poultry ranches around Antelope Valley, California, where I performed my most unusual job--putting saddles on turkeys (yes, putting saddles on turkeys). I continued this until I graduated from high school, after which I went to work for Standard Stations, Inc. as a salesman. I worked for Standard until I went on active duty in the U.S. Navy. After I was discharged, I held various jobs while I attended Junior College- salesman, bus driver, carpenter, truck driver, until I was hired by the Los Angeles County Fire Department where I worked full time until I graduated from the University of Southern California. I worked my way through Law School as a librarian; process server and a law clerk for an Ann Arbor, Michigan Law Firm, where I worked until graduation.

7. Military Service: Have you had any military service? Give particulars.

Yes. United States Naval Reserve, March 12, 1958-March 11, 1964. Active duty from February 10, 1959, through January 21, 1961, Personnel Man Second Class. Serial Number 4843126. Honorably discharged on March 11, 1964.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the committee.

1969- Graduated Cum Laude from University of Southern California.

1969- Recipient of the University of Southern California Faculty Letter of Merit Award for "interest and promise of leadership in the field of Public Administration, and significant service to the School of Public Administration and the University of Southern California".

1970- University of Michigan- received the American Jurisprudence Award for Excellence in the Field of Torts.

1982- Mayor's Certificate of Merit for Community Betterment Through Outstanding Judicial Performance.

1982- Appointed by President Reagan to be a delegate to the 35 nation International Conference on Free Elections sponsored jointly by the U.S. State Department and the American Enterprise Institute. I was the only U.S. Judge to serve as a delegate.

1982- Recipient of the Mayor Louis Tullio Celebrated Citizen Proclamation-Judge Nygaard day in Erie.

1982- Community Service Award in the area of individual and human rights presented by the Seventh Day Adventist Church.

1983- Erie County Grange Community Service Award of the Year for the Elected Official who made the greatest public service contribution.

1984-Multiple Sclerosis Society Award for Community Service.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you have been a member and give the titles and dates of any offices which you have held in such groups.

Erie County Bar Association
Pennsylvania Bar Association
American Bar Association
Pennsylvania Conference of State Trial Judges
National College of Probate Judges
American Judges Association

10. Other Memberships: **List all organizations to which you belong that are active in lobbying before public bodies.**

The only organizations to which I belong which is involved in lobbying before public bodies in the National Association for the Advancement of Colored People. I am a life member.

Please list all other organizations to which you belong:

Erie Council for Exceptional Children
Erie Association for Retarded Citizens
Pennsylvania Farmers Association
Scotch Highland Breeders Association (beef cattle)
Sons of Norway
F & A Masons, Ann Arbor Michigan
Order of the Eastern Star, North East, Pennsylvania
Ducks Unlimited
Boy Scouts of America, French Creek Council
Trout Unlimited
Cursillo Movement, Diocese of Erie
American Legion Post Number #105, North East, PA
Presbyterian Church
Edinboro University of Pennsylvania Board of Advisors
United States Supreme Court Historical Society
The Shrine Club
The Erie Club

11. Court Admission: **List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Court of Common Pleas, April, 1972.
Pennsylvania Supreme Court, October, 1972.
United States District Court for the Western District of Pennsylvania, October, 1972.
United States Supreme Court, June, 1977.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have written no legal books. I have written several articles, a few of which are appended. Also during my term as Judge, I have spoken to numerous organizations and groups from the American Legion, where I spoke on "A Day in the Life of a Colorado Cowboy", to the International Conference on Free Elections, where I addressed the conference on the necessity of a free and independent judiciary as a requisite to the guarantee of free elections (this conference was co-chaired by Secretary of State Schultz and Ambassador Jean Kirkpatrick and included delegates from thirty-five nations). I have included speeches as requested. SEE ATTACHED EXHIBIT A.

Secondly, I enjoy research. I am now doing research for an article entitled "The Columbian Union: An Athenian Democracy for the New World". In the early 1800s, a group of anti-federalists, disenchanted with what they saw as continuing government by the aristocracy, sought to amend the Constitution. Believing that our republican form of government was a bad compromise between monarchy and democracy, they proposed an athenian-style democracy instead. I am not sure yet where the research will take me. There is very little in print about the Columbian Union.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. I exercise daily; I cross-country ski, bicycle and hike for recreation. Most recent physical exam, October, 1987.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In December, 1980, I was appointed Judge of the Pennsylvania Court of Common Pleas by Governor Thornburgh. This appointment was confirmed in May of 1981. I served pursuant to that appointment until 1983 when I was elected. In the spring primaries of 1983, I received the nomination of both Democrat and Republican parties. I was sworn in as an elected Judge in January of 1984. The Court of Common Pleas is the Court of general jurisdiction in Pennsylvania.

15. Citations: If you are or have been a Judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

I have appended ten of my Opinions, marked as Exhibit B.

As Exhibit C I have created a short summary of and citations for all appellate Opinions I can locate where my decisions were reversed. There are instances where the reviewing Court has corrected sentences or simply remanded a case for correction of a sentence, (i.e. I sentenced a man to one and one-half to three years without possibility of parole. This was corrected to a three to six year sentence with possibility of parole). These have not been included. I can find no instance where my judgment was affirmed with significant criticism of my substantive or procedural rulings.

I have appended as Exhibit D Opinions which I have written on Constitutional issues and citations to Appellate Court rulings thereon.

16. Public Office: State chronologically any public offices you have held other than judicial offices, including terms of service and whether appointed or elected. State any unsuccessful candidacies for elective public office.

In 1977 I was a candidate for and elected as as a County Councilman for Erie County from the Sixth Councilmanic District, in which capacity I served until being appointed to my position as Judge.

I have not run unsuccessfully for any public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

December, 1971-March, 1981. Partner in Orton, Nygaard and Dunlavey, 33 East Main Street, North East, PA 16428. May, 1981-present, Judge of the Court of Common Pleas of Pennsylvania, Sixth Judicial District, Erie, Pennsylvania.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

During the time I was in the practice of law, I was a general practitioner. It included only minor matters of litigation, domestic relations, counseling, estate planning and probate.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Typical clients included families, small businesses and corporations around the North East, Pennsylvania area. From 1976 until the time I ascended the Bench, I also represented the Dr. Gertrude A. Barber Center, Inc., the Erie Council for Exceptional Children and the Erie Association for Retarded Citizens. In that capacity I developed somewhat of a specialty in law and the mentally retarded.

I was also a trustee in bankruptcy and when the new bankruptcy code was enacted, I was appointed as one of five trustees in Erie County. Consequently I developed somewhat of a sub-specialty in bankruptcy law as well.

Finally, I represented two Second Class Townships (North East and Wayne) and developed some expertise in Municipal Law and especially Zoning. I wrote a "model" Agricultural Zoning Code.

7.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in Court only infrequently. When I first started practice in 1972, I defended several indigent persons on criminal charges based upon Court appointments. I had relatively few Court appearances thereafter until I became a bankruptcy trustee. In the years 1979 and 1980, I appeared in Court more frequently as Attorney for bankrupt clients and as a trustee in bankruptcy. I also appeared occasionally on behalf of clients at District Magistrate Court.

2. What percentage of these appearances were in federal courts, state courts of record, other courts.

Federal Courts-40%
State Courts of record-30%
Other Courts-30%

3. What percentage of your litigation was civil; criminal.

Civil litigation-100% (with the exception that in 1972 I accepted several Court appointments to represent indigent defendants).

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I do not recall the number of cases which I tried to verdict or judgment. As an Attorney there would only be a few, as a Judge, I have presided over hundreds. During the time I was in the practice of law, I was a general practitioner. It included only minor matters of litigation, domestic relations, counseling, estate planning and probate. Since becoming a Judge, I have tried civil, criminal, jury and non-jury cases almost on a daily basis.

5. What percentage of these trials were jury; non-jury.

(a) I can only recall two cases which I tried, as an Attorney, to verdict before a jury. The balance were all tried before a Judge, Administrative Law Judge or Bankruptcy Referee.

As Judge, trials are about evenly divided between jury and non-jury. I try approximately 40 jury trials a year; oral arguments, and equity or bench trials by the hundreds..

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented, describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case dates of representation, names of the courts and judges they came before and the names, addresses and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Because of the nature of my practice (see question 17), it is hard to find any ten cases which I would consider to be significant. However, following is a sampling of my litigation.

IN RE: SUNNYSIDE HOME FOR GIRLS, 26 Fid. Repr. 423 (1976). I represented the Erie Council for Exceptional Children, Inc.. It was seeking by the Doctrine of Cy Pres to be the distributee of certain property owned by the Sunnyside Home for Girls. The E.C.E.C.I. had leased the property from Sunnyside for years. Sunnyside was a nearly defunct corporation whose only asset was the real estate. They wished to give it to E.C.E.C.I.. However, because the purposes of the two corporations were somewhat different, the prayer was denied. The case was tried before the Honorable James Dwyer, Erie County Orphans' Court, Erie, Pennsylvania on May 6, 1976. Sunnyside Home for Girls was represented by Donald C. Buseck, Esquire, 1400 G. Daniel Baldwin Building, Erie, Pennsylvania 16501 (814)454-3821. Gannondale Home for Girls was represented by Michael L. Carr, Esquire, 5620 Peach Street, Erie, Pennsylvania 16509 (814)868-0930.

SELKREGG V. RIDG-U-RAK, INC (settled unreported). I represented Ridg-U-Rak, Inc. and defended it in a Declaratory Judgment action and an action on an employment contract. Selkregg, a terminated employee, was claiming certain severance rights, and retirement benefits under ERISA. The case was ultimately settled. Mr. Selkregg was represented by Attorney Harry Martin, 150 E. 8th Street, Erie, Pennsylvania 16501 (814)456-4000.

BETTY PRESTON V. YELLOW CAB COMPANY (settled unreported).
I represented Betty Preston in an action against Yellow Cab Company for injuries which she sustained as a passenger in a Yellow Cab which was involved in a traffic accident. This pre-dated our "no fault" law in Pennsylvania. No significant issues were presented in this case. Yellow Cab Company was represented by John Wolford, Esquire, 600 First National Bank Building, Erie, Pennsylvania 16501 (814)453-7611.

COMMONWEALTH V. KUTRUFF. I successfully defended Henry Thomas Kutruff on a charge of Arson for the burning of a home in an outlying township. The case presented no significant issues of law. However it provides an example of my courtroom skills and professional demeanor in a jury trial. The District Attorney was Alois Lubiejewski, Esquire, 402 West Sixth Street, Erie, Pennsylvania 16507 (814)452-4451.

COMMONWEALTH V. MARTINSON. I was unsuccessful in the defense of Mr. Martinson on a charge of Aggravated Assault which arose out of a bar fight, in which he was eminently successful. Once again, no significant issues of law were presented. It was a jury trial. The District Attorney was Daniel Kuhn, 72 N. Main St., Union City, Pennsylvania 16438 (814)438-7671.

IN RE: MEADVILLE CITY HOSPITAL. I was the "fair Hearing Examiner", appointed pursuant to federal regulations found at 42 C.F.R. §100.106 (1978). Meadville City Hospital had requested a hearing in accordance with the provisions of Section 1122 of the Social Security Act, claiming a lack of substantial evidence to support the Department of Public Assistance findings and recommendation that Meadville City Hospital had not demonstrated the need for a project to be federally funded. The decision ultimately turned on a very interesting point of law. The hospital feeling it had been denied due process had requested a fair hearing. In order to prepare for the hearing they requested and as Hearing Examiner I ordered, the depositions of a number of people including Dr. Gordon K. McLeod, Secretary of the Pennsylvania Department of Health. The Department of Health refused to submit Dr. McLeod for deposition, claiming instead "executive privilege". The Department was unable to substantiate its claim of executive privilege on behalf of the Secretary. Accordingly, I ordered his deposition. When he refused to submit himself for deposition, the hospital claimed that it was being denied the fair hearing to which it was entitled under the Social Security Act. I quite agreed. Thereafter, the hospital submitted a "Motion for Decision Reversing the Designated Planning Agencies Recommendations to the Secretary of Health, Education and Welfare Regarding Meadville City Hospital's Proposed Capital Expenditure". The result sought by the hospital with its motion was one without precedent in a Section 1122 proceeding and requested the equivalent of a Summary Judgment in an amount which (by my recollection) was close to four million dollars. The Department was unable to give me any compelling reason (1)why they should not submit the Secretary for deposition (2)if they did not, why I should not grant judgment for the hospital. Consequently on December 2, 1979, I reversed the recommendations of the Designated Planning Agency for the capital expenditure proposed at the Meadville City Hospital and declared them to be in conformity with the standards, criteria and plans described in 42 C.F.R. §100.104 (a)(2). Meadville City Hospital was represented by Clara Mattern, Esquire, 4614 Fifth Ave., Pittsburgh, PA 15213 (412)687-7677 and Linda Haddad Hogue, Esquire, of the same address and telephone number and Barbara A. Blackmond, Esquire of the same address and telephone number. The Commonwealth of Pennsylvania Department of Health was represented by the Attorneys General, D. Galton Cabot Moss, Esquire, P.O. Box 90, Harrisburg, PA 17120 (717)783-2500, Attorney Reed Hamilton of the same address and telephone number, Attorney Carolyn B. McClain of the same address and telephone number.

However, after my intense participation in the system as Trial Judge, I cannot point to any of the cases which I participated in as an Attorney and call them significant or which allowed me the opportunity to distinguish myself as a trial counsel. The grist of my daily practice was counsel for the family problems and the problems of the small business. I was a farmer myself, and represented a large number of the farmers in the east county area.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

In addition to the above, as Judge I have presided over hundreds of cases which have been tried to verdict or judgment. I could not begin to state the number of cases that I have heard in the seven years that I have been a Judge. I heard the first capital case tried in Erie County in 30 years; a bitter, divisive school strike; civil cases from boundary disputes to million dollar verdicts; from class action suits to the pro per aggrieved.

Another legal activity which has had a significant impact on my abilities as a Judge is teaching law. I have lectured on "American Legal Systems" and "Constitutional Law" at the Pennsylvania State University, Behrend Campus.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

I analyze all cases preliminarily to determine whether I

(a) Know any of the parties;
(b) Have a close personal relationship with any Attorneys on the case; and
(c) Whether I might conceivably have any interest, direct or otherwise, in the outcome of the case.

In the event I find (a), I reveal the same to the Attorneys and parties and if any objections are made, hear the objections to determine whether or not there will be the appearance of an impropriety. In the event I find (b) I reveal the same to the Attorneys and parties and if any objections are made, hear the objections to determine whether or not there will be the appearance of any impropriety. In the event I would ever find (c) I would recuse myself from the case. That has never happened.

I only recall having recused myself once in a situation which involved matters filed against a corporation which I had represented as an Attorney. The trial came within a year and a half after my appointment to the bench.

I can identify no categories of litigation or financial arrangements that are likely to present any potential conflicts of interest during my service on the Federal bench. Indeed, it is my intention to analyze every organization, and investment to determine whether it might potentially give the appearance of impropriety. If I find that it will or may, I will withdraw or sell my interest, whichever the case may be.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No, except that I have been admitted to the Master in Judicial Studies program at the National Judicial College. I have just begun my studies there. Also, at the time this federal opportunity was presented, I was in the process of establishing a schedule whereby I could obtain my Ph.D. in philosophy. (It is my intention to pursue my Ph.D. if appointed to the Federal Court, or, continue my Masters program if I remain on the State Bench).

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report required by the Ethics in Government Act of 1978, may be substituted here).

1987-

Commonwealth of Pennsylvania	Judicial Salary	$ 68,992.00
Nygaard Family Partnership	Distribution	$ 2,116.00
Prudential Bache	Dividend Income	$ 243.00
Philadelphia Electric	Dividend Income	$ 25.00
Union Electric	Dividend Income	$ 14.00
Baltimore Gas	Dividend Income	$ 221.00
Central and SW Corp.	Dividend Income	$ 197.00
Central Maine Power & Light	Dividend Income	$ 77.00
Centerior Energy	Dividend Income	$ 185.00
Minnesota Power	Dividend Income	$ 135.00
Fireman & Agricultural C.U.	Interest Income	$ 7.00
First National Bank	Interest Income	$ 297.00
National Bank of North East	Interest Income	$ 300.00
Venango Land and Farming	Interest Income	$ 254.00
Venango Land and Farming, Inc.	Interest Income	$ 1,993.00
Sixth Street Complex	Interest Income	$ 183.00
Venango Mgmt. Services, Inc.	Interest Income	$ 687.00
Baltimore Gas and Electric	Gain on stock sale	$ 1,637.00
Centerior Energy	Gain on stock sale	$ 534.00
Robert Hicks	Int. on sale of r.e.-art. of agt.	$ 782.00

Central and SW Corp.	Gain on stock sale	$ 780.00
Central Maine Power	Gain on stock sale	$ 812.00
Minnesota Power	Gain on stock sale	$ 810.00
Union Electric	Gain on stock sale	$ 1,482.00
Philadelphia Electric	Gain on stock sale	$ 606.00
Gas Well at Farm	Royalty	$ 109.00
Venango Mgt. Services, Inc.	Distribution from Sub-Chapter S. Corp.	$ 316.00
Vineyard Oil and Gas Co.-1979-I	Ltd. part. dist.	$ 704.00
Vineyard Oil and Gas-1980-IV	Ltd. part. dist.	$ 336.00
Vineyard Oil and Gas-1981-II	Ltd. part. dist.	$ 28.00
Vineyard Oil and Gas-1981-III	Ltd. part. dist.	$ 4.00
Vineyard Oil and Gas-1982-III	Ltd. part. dist.	$ 123.00
Vineyard Oil and Gas-1982-IVB	Ltd. part. dist.	$ 287.00
Sixth Street Complex	Ltd. part. dist.	$ 163.00

1988-

Commonwealth of Pennsylvania	Judicial Salary	$ 7,681.00
Nygaard Family Partnership	Distribution	$ 1,000.00
Venango Land and Farming, Inc.	Interest	$ 750.00
Minnesota Power and Light	Dividend Income	$ 8.00
Robert Hicks	Int. on sale of r.e.-art. of agt.	$ 280.00
Vineyard Oil and Gas	Ltd. part. dist.	$ 506.00
Sixth Street Complex	Ltd. part. dist.	$ -0-

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

SEE FINANCIAL NET WORTH STATEMENT WITH SCHEDULES ATTACHED

EXHIBIT D

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	6	228	00
U.S. Government securities—add schedule			
Listed securities—add schedule A		529	00
Unlisted securities—add schedule B	310	375	00
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule C	110	500	00
Real estate mortgages receivable			
Autos and other personal property	15	000	00
Cash value—life insurance		500	00
Other assets—itemize:			
D	168	712	00
Total assets	611	844	00

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured			
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule	17,	232	00
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	17,2	32.	00
Net worth	594,6	12.	00
Total liabilities and net worth	$611,8	44.	00

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor *	60	000	00
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.) No			
Are you defendant in any suits or legal actions? No			
Have you ever taken bankruptcy? No			

*Venango Land and Farming: The Banks require that al' three shareholders also sign the notes for the corporation's line-of-credit.

SCHEDULE A- LISTED SECURITIES

23 shares common stock in Minnesota Power and Light (sold-1988)	$ 529.00
TOTAL-	$ 529.00

SCHEDULE B- UNLISTED SECURITIES

100 shares of Venango Land and Farming-	$310,000.00
375 shares of Vineyard Oil and Gas-	$ 375.00
TOTAL-	$310,375.00

SCHEDULE C- REAL ESTATE OWNED

Residence- 59 Gibson Street, North East, PA-	$107,000.00
Lot- Mina, New York-	$ 3,500.00
TOTAL-	$110,500.00

SCHEDULE D- OTHER ASSETS

Vineyard Oil and Gas Company, Inc.- limited partnership	$100,000.00
Registered Scotch Highland Beef Cattle-	$ 1,800.00
Sixth Street Complex, Limited Partnership-	$ 7,500.00
Robert Hicks, balance due on articles of agreement for sale of real estate-	$ 6,412.00
Venango Land and Farming, balance due on notes-	$ 53,000.00
TOTAL-	$168,712.00

6. Have you ever held a position or played a role in a political campaign?

No.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged". Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have been a member of several organizations which serve the mentally retarded. These include the Dr. Gertrude A. Barber Center, the Erie Council for Exceptional Children, and the Erie Association for Retarded Citizens. Before becoming a Judge, I represented all three as their solicitor and participated in other fund raising activities on their behalf. Since becoming a Judge, the Pennsylvania State Code of Professional Responsibility forbids my participation in any fund raising activities, even on behalf of charities. I participated with these organizations from 1976-1981 when I became a Judge.

However, my sensitivity to the needs of the mentally retarded comes not so much from my activities as an Attorney or the Canons of the American Bar Association. One of my close companions as a child was my uncle. He is mentally retarded. Although an adult, he grew up with us as a friend. Very early I became sensitized to the problems of the mentally retarded and the difficulties they face being thus stigmatized. I recall on a number of occasions coming to his defense from verbal taunting and the type of cruelty to which our mentally retarded were subjected during the forties and fifties. I have never forgotten that.

I am also a life member of the NAACP. Once again, my participation in that organization has little to do with my profession. I was sensitized to the needs of blacks, American and world-wide, by my aunt, who was a missionary and teacher in Liberia for forty years (1919-1959). Her visits to our house, her teachings, and our conversations when I was a child, made me particularly sensitive to race relations. I was raised as a part of a Norwegian culture which stressed accountability for both individual achievement and caring for those less advantaged. Thus, in my formative childhood years, the concerns of blacks were part of our household conversation, and, we were taught to care.

In 1983, when I was invited by President Dwayne Brock to join the NAACP as a life member, I did so. As an affirmative act on my part, I was the first Judge to employ a black law clerk in Erie County, who may well be its first black Judge.

In 1980, my wife and I served as the co-chairpersons of the 1980-81 Cerebral Palsy telethon. This was a fund raising activity, we stayed up, and stayed on television for the twenty-four hours of the National Cerebral Palsy Telethon.

In 1982, my wife and I were the celebrity co-chairpersons of the Erie County March of Dimes.

In 1981 I hired a secretary who had Multiple Sclerosis. Later we formed the N.W. Pennsylvania Chapter of the National Multiple Sclerosis Society, where I served one year as Vice-President.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that indiviously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies?

No. I am a member of the Freemasons and a member of the Order of the Eastern Star. Freemasons is male and Eastern Star is female. My reasons for membership are primarily charitable. Masonic bodies nationwide contribute approximately one and one-half million dollars daily to a variety of charities.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

Yes.

If so, did it recommend your nomination?

Yes.

Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

In 1985, there existed three vacancies for the United States District Court for the Western District of Pennsylvania. I indicated my interest in one of those vacancies to both Senator Arlen Specter and Senator John Heinz. However, thereafter I withdrew my name from consideration (at that time I had three children in school who were involved in a constant stream of activities. I was vicariously enjoying the high school experience I never had). In January of 1987, I wrote a letter to the Justice Department and indicated my interest in the vacancy which existed for the United States Court of

Appeals, Third Circuit and notified once again Senator Specter and Senator Heinz that I would be interested in a federal appointment. In the spring of 1987, I met Senator Arlen Specter informally. He informed me that there would be a vacancy on both the United States District Court, and on the United States Court of Appeals. He suggested that I submit my name for consideration. I did so. In the summer of 1987, a Judge from the U.S. District Court told me that if "they would appoint somebody like you" he would take senior status. Once again I informed both Senators of this conversation. In December of 1987 I was notified by the selection commission from my jurisdiction that I should submit my application. In January of 1988, I was invited to come before the commission for an interview. They recommended my nomination. In February of 1988, I was invited to Washington, D.C. for interviews at the Justice Department. I interviewed with three individuals.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question?

No, except that I was asked if Pennsylvania had capital punishment. I replied that it does. I was asked if that caused me any difficulty or words to that effect. I replied that it did not. I had taken an oath to apply the law, which I did. I was asked if I had ever imposed the death penalty. I replied that I had.

5. Please discuss your views on the following criticism involving "judicial activism".

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

The criticism in general refers to the times when the Court fails to abide the separation of powers doctrine. I believe adherence to the doctrine is a necessary corollary to and ingredient of the dynamic equalibrium which exists between the branches of government. The source of power in our government is the people. The power is delegated to their representative legislature to enact laws. The work of the Courts is not to legislate, but to give judicial effect to legislative pronouncements. If we do more, while the results may be popular, we risk our institutional capital--judicial prestige. This is the most effectual basis to insure compliance by the other branches and the people. I am concerned when approval of the actions of the court depends upon pleasure with results without equal concern with the purity of the process. The essence of the judicial function is reason- reason based upon rule of institutionally and politically approved laws--reason which contests the law only when it runs afoul of the supreme law, or, when governmental action incurs upon protected individual rights.

AFFIDAVIT

I, Richard L. Nygaard, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

5-31-88
(DATE)

Richard Lowell Nygaard
(NAME)

Suzanne R. [illegible]
(NOTARY)

Suzanne [illegible]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

David Brookman ("Brooks") Smith

2. **Address: List current place of residence and office address(es).**

Residence: 3008 Second Avenue
Altoona, PA 16602

Office: Blair County Courthouse
Hollidaysburg, PA 16648

3. **Date and place of birth.**

Born December 4, 1951, at Altoona, PA

4. Marital Status **(include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Married Karen Elaine Hall, April 22, 1977. Wife is a commercial loan officer with Mid-State Bank and Trust Company, 1130 Twelfth Avenue, Altoona, PA.

5. Education: **List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

B.A., Franklin and Marshall College
Attended Fall 1969 - Spring 1973
Degree conferred June, 1973

J.D., Dickinson School of Law
Attended Fall 1973 - Spring 1976
Degree conferred June, 1976

Washington Semester Program,
American University
Attended Fall Semester, 1971

6. Employment Record: **List (by year) all business or professional corporations, companies firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

1975-76	Research Assistant (part-time)—Senate of Pennsylvania
1976-79	Associate Attorney—Jubelirer, Carothers, Krier & Halpern
1980-84	Partner—Jubelirer, Carothers, Krier, Halpern & Smith
1977-79	Assistant District Attorney of Blair County (part-time)
1981-83	Special Assistant District Attorney of Blair County (part-time)
1983-84	District Attorney of Blair County (part-time)
1983-84	Partner--S/U Associates
1984-	Judge--Court of Common Pleas of Blair County

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

N/A

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Member, Pi Gamma Mu (International Social Science Honor Fraternity)

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

Member, Pennsylvania Conference of State Trial Judges (1984-present)
Member, American Bar Association (1976-present)
Member, Pennsylvania Bar Association (1976-present)
Member, Blair County Bar Association (1976-present)
Former Member, Pennsylvania Trial Lawyers Association (1981-84)
Former Member, National District Attorneys Association (1984)
Former Member, Pennsylvania District Attorneys Association (1977-79; 1984)
Member, Criminal Procedural Rules Committee, Supreme Court of Pennsylvania (1986-present)
Chairman, Legislative Committee, Pennsylvania Conference of State Trial Judges (1987-present)
Co-Chairman, Economics and Finance Committee, Pennsylvania Conference of State Trial Judges (1986-present)
Member, EDP Steering Committee on Court Automation (Appointed by Justice Stephen Zappala in April, 1987)
Former co-chairman, Rules of Court Committee of Blair County Bar Association (1979-82)

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

I belong to no organizations that are active in lobbying before public bodies, except to the extent that the Pennsylvania Conference of State Trial Judges does, on occasion, take a position on certain legislation and communicates the Conference position to the General Assembly of Pennsylvania.

All other organizations:

Member, Transition Team, Commission for a New Lutheran Church (Allegheny Synod)
Board Member, Salvation Army
Board Member, State YMCA of Pennsylvania, Inc.
Member President's Cabinet, Saint Francis College
Board Member, Domestic Abuse Project of Blair County
Member, Altoona Lions Club

10. Continued

Member, Blair County Law Enforcement Association (Charter Member)
Member, Spruce Creek Rod & Gun Club
Member, Blair County Game, Fish & Forestry Association
Member, Navy League of the U. S.
Member, Tyrone Lodge No. 494, F.&A.M.
Member, Blair County Historical Society
Member, Amen Corner
Member, The Pennsylvania Society
Former Member, Budget Committee, Trinity Lutheran Church
Former Member, Governor's Advisory Committee to Oversee Implementation of Commonwealth's Plan for Equal Opportunity in the State-Supported Institutions of Higher Education
Former Board Member, Altoona Symphony Society
Former Board Member, Blair County Legal Services Corporation
Former Trustee, Altoona Area Public Library
Former Board Member, Family & Childrens' Service of Blair County
Former Board Member, Blair County Society for Crippled Children and Adults

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Pennsylvania
(Admitted, October 27, 1976)

U. S. District Court for Western District of Pennsylvania
(Admitted, July 19, 1979)

U. S. District Court for Middle District of Pennsylvania
(Admitted, October 7, 1983)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have neither written nor edited any books, articles or reports. Copies of speeches are attached as Appendix "A."

13. Health: What is the present state of your health? List the date of your last physical examination.

Very good. My last physical examination was April 8, 1988.

14. **Judicial Office: State (Chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

I am presently a judge of the Court of Common Pleas of Blair County, Pennsylvania having taken office on December 21, 1984, following appointment by Governor Dick Thornburgh and after unanimous confirmation by the Senate of Pennsylvania. Thereafter, in 1985, I was elected to a ten-year term with the nominations of both the Republican and Democratic parties. I have held no other judicial offices. The Court of Common Pleas is a trial court of general jurisdiction.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions of federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

(1) Ten most significant opinions:

a) Appleman v. Commercial Union Insurance Co., 457 C.P. 1985 (August 14, 1985); opinion attached; no appeal.

b) Bowers v. Haberstroh, C.A. Nos. 273, 274 & 283 of 1985 (July 21, 1987); opinion attached; affirmed by Superior Court of Pennsylvania at No. 1206 Pgh. 1987 by opinion dated March 9, 1988, also attached.

c) Commonwealth v. Arthurs, C. A. Nos 320, 246, 245, 408 & 409 of 1986 (June 10, 1987); opinion attached; appeal to Superior Court quashed.

d) Commonwealth v. Salsgiver, C.A. No. 488 of 1986, 42 D.&C.3d 115 (1987) (February 27, 1987); published opinion attached; no appeal taken.

e) Commonwealth v. Settlemyer, C.A. No. 824 of 1987 (March 21, 1988); opinion attached; defendant awaiting sentence.

f) Commonwealth v. Tate, C.A. No. 633 of 1987 (January 11, 1988); opinion attached; no appeal taken.

g) Conrad v. Progressive Casualty Insurance Co., No. 491 C.P. 1986 (May 28, 1987); opinion attached; no appeal taken.

h) Hollidaysburg Limited Partnership v. PHFA, No. 97 C.P. 1985 (October 2, 1985); opinion attached; no appeal taken.

i) Neal v. Altoona Hospital, No. 1529 C.P. 1984, 38 D.&C.3d 599 (October 18, 1985, and June 10, 1985); published opinion attached.

j) Settle v. AFSCME et al., No. 2017 C.P. 1986 (June 17, 1987); opinion attached; no appeal taken, but same issue subsequently passed upon in Speer v. Philadelphia Housing Authority, ___Pa. Cmwlth.___, 533 A.2d 504 (1987).

(Copies of the foregoing opinions are enclosed as Appendix "B")

15. **Continued**

(2) I have not been reversed by an appellate court, nor has my judgment ever received significant criticism in an affirmance.

(3) Significant opinions on federal or state constitutional issues:

a. Commonwealth v. Settlemyer, supra.

b. Commonwealth v. David Bidoli, C.A. Nos 716 and 729 of 1986 - Unpublished opinion dismissing defendant's post-verdict motions which averred, inter alia, that the trial court should have directed partial closure of the courtroom, excluding a group of young school children during summations in drug prosecution.

c) Bowers and Welshams v. Cunningham, No. 603 C.P. 1985 - Unpublished opinion granting prisoner's request for leave to be married.

d) Commonwealth v. DiSabato, C.A. No. 736 of 1987 - Unpublished opinion in which Court denies defense request for disclosure of material from files of rape crisis counsellors in rape prosecution.

e) Commonwealth v. White, C.A. No. 1000 of 1985 - Unpublished opinion in which Court grants suppression of blood test results.

(Copies of the foregoing opinions are enclosed as Appendix "C")

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

1977-79 Assistant District Attorney of Blair County (appointed)
1981-83 Special Assistant District Attorney of Blair County (appointed)
1983-84 District Attorney of Blair County (appointed by Board of Judges to fill a vacancy)
I have never been an unsuccessful candidate for elective public office.

17. **Legal Career:**

a. **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.**

I have never served a judicial clerkship.

17. Continued

2. whether you practiced alone, and if so, the addresses and dates;

I have never been a sole practitioner.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

I began an association with the law firm of Jubelirer, Carothers, Krier and Halpern, Central Trust Building, Altoona, Pennsylvania, several weeks after taking the Pennsylvania Bar Examination at the end of July, 1976. I served as an associate attorney with that firm until January 1, 1980, on which date I was admitted to a new partnership, under the name of Jubelirer, Carothers, Krier, Halpern and Smith. From May, 1977 until December 31, 1979, I served concurrently as a part-time assistant district attorney of Blair County, with an office in Annex #1, Blair County Courthouse, Hollidaysburg, Pennsylvania. While still a partner in Jubelirer, Carothers, Krier, Halpern and Smith, I served as a part-time special assistant district attorney of Blair County assigned to an investigating grand jury from October, 1981 until October, 1983.

In June, 1982, my law firm moved its offices to 309 East Plank Road, Altoona, Pennsylvania. My private law office remained at that location until my ascension to the bench of the Court of Common Pleas of Blair County on December 21, 1984.

On December 30, 1983, I was appointed by the Board of Judges of Blair County to fill a vacancy in the office of District Attorney of Blair County. I held that office, a part-time position, until December 10, 1984, when I resigned due to my imminent ascension to the Common Pleas Court bench.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Because of my prosecutorial function throughout most of my years of practice, a significant percentage of my work was criminal in nature. My private practice consisted of general trial work, including negligence, divorce and child custody litigation. Between 1980 and 1984, my private practice included considerable municipal work. Although I handled real estate transactions and decedents' estates throughout the years of my practice, they constituted only a small portion of my practice.

17. Continued

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My client mix was an interesting amalgam of individuals and corporations. I represented hundreds of individuals in miscellaneous and domestic litigation. I acted as solicitor for a city planning commission, a city housing authority, a regional sewer authority and an emergency medical authority. I represented the interests of the Commonwealth of Pennsylvania's Occupational Disease Fund in a multi-county area. I represented a major auto manufacturer in warranty claims, and its separate corporate credit arm in collection matters, throughout portions of Western and Central Pennsylvania. I also had several small corporate and business clients.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court quite regularly, often on a daily basis. Although my court appearances were less frequent during the early 1980's while I was not engaged in prosecution, I still appeared in various court and adversarial proceedings on at least a weekly basis.

2. What percentage of these appearances was in:

(a) federal courts;

Less than 5 %

(b) state courts of record

Approximately 75 %

(c) other courts

Approximately 20 % (master's and administrative hearings)

3. What percentage of your litigation was:

(a) civil

Approximately 50 %

(b) criminal

Approximately 50 %

17. Continued

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

A conservative estimate of both civil and criminal cases, both jury and non-jury, which I have tried to verdict as sole counsel in courts of record is one hundred (100).

5. What percentage of these trials was:

(a) jury

Approximately 33-1/3%

(b) non-jury

Approximately 66-2/3%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Commonwealth v. Eshelman, 477 Pa. 93, 383 A.2d 838 (1978) Defendant was convicted of possession of a controlled substance with intent to deliver following a non-jury trial. The trial court had refused to suppress a quantity of marijuana which had been seized by an off-duty auxiliary policeman who had walked behind the home of defendant's grandmother while looking for a friend. The off-duty officer noticed an old car which contained a number of thin rolls tied with string, and he became suspicious. After extracting one of the rolls, he took it to the police station where State Police were then called in. The contents were tested and determined to be marijuana, after which a warrant was obtained to search the old car.

The Supreme Court of Pennsylvania reversed, concluding that the off-duty officer's conduct was inconsistent with the theory that he was a mere private citizen. This case has been frequently cited by Pennsylvania courts in addressing certain search and seizure issues.

I argued this case for the Commonwealth before the Pennsylvania Supreme Court. The brief, however, was written by another assistant district attorney, and I was not trial counsel.

18. **Continued**

Counsel for the defendant, both at trial and at appellate argument, was Thomas M. Reese, Esq., whose office is located at 85 Logan Boulevard, Altoona, Pennsylvania, 16602 (814-944-6111).

2. Natalie Brothers Towing Service, Inc. v. Murray Ford and Ford Motor Co., 41 D.&C.3d 224 (1984); C.P. of Clearfield County No. 79-3379—Plaintiff sued both vehicle manufacturer and dealer alleging various defects in a truck, plaintiff contending breach of certain warranties. Trial by jury commenced on April 23, 1984, and defendants moved for non-suit at the conclusion of plaintiff's case. Those motions were granted after defendants argued the evidence would not support a proper measure of damages.

   I was sole counsel for defendant Ford Motor Co. from the point suit was initiated, throughout discovery, and during trial. The matter was tried in the Court of Common Pleas of Clearfield County before the Honorable John K. Reilly, Jr.

   Counsel for the plaintiff was James N. Bryant, Esq., 116 W. Main Street, Millheim, Pennsylvania, 16854 (814-349-5666), and counsel for defendant Murray Ford was Anthony S. Guido, Esq. (814-371-7768).

3. Commonwealth v. John F. Maras, D.O., C.A. 218-233 of 1979 Blair County—A physician was tried and convicted for illegally prescribing and dispensing controlled substances. This was one of the first prosecutions of a physician in Central Pennsylvania for violating the Drug, Device and Cosmetic Act. This prosecution gained added significance when the defendant, while serving his prison sentence, cooperated with an investigative grand jury probe in prosecuting a corrupt organization which has been identified by the Pennsylvania Crime Commission as part of the LaRocca crime family of Pittsburgh.

   I represented the Commonwealth from the initial stages of the investigation, through trial and post-verdict motions. The case was tried before the Honorable John A. Cherry, Specially Presiding, in the Court of Common Pleas of Blair County, from January 29, 1980 to February 8, 1980.

   The defendant was represented at trial by Harold E. Miller, Esq., Mellon Bank Building, Altoona, Pennsylvania, 16601 (814-943-1462) and by R. Thomas Forr, Esq., 2229 Broad Avenue, Altoona, Pennsylvania, 16602 (814-946-4316).

4. Commonwealth v. Ardean Miller, C.A. 127 & 237 of 1981—The defendant was charged with Criminal Homicide and related offenses following the delivery of the body of his girlfriend to the emergency room of a local hospital. She had been shot through the head with defendant's pistol which police located shortly thereafter on the dashboard of his car. The prosecution's case was entirely circumstantial. The jury returned a verdict of guilty of involuntary manslaughter.

18. Continued

Trial lasted from March 15, 1982 through March 19, 1982, before the Honorable Thomas G. Peoples, Jr., President Judge of the Court of Common Pleas of Blair County. I represented the Commonwealth as sole trial counsel, and also argued the matter before Superior Court. Sentence was modified by that Court at No. 01113 Pittsburgh, 1982.

The defendant was represented at trial by Harold E. Miller, Esq., Mellon Bank Building, Altoona, Pennsylvania, 16601 (814-943-1462), and on appeal by John Woodcock, Jr., Public Defender, Blair County Courthouse, Highland Hall Annex, Hollidaysburg, Pennsylvania (814-695-5541).

5. Commonwealth v. Robert John Sweitzer, C.A. 685 of 1975—Defendant was prosecuted for Aggravated Assault and related offenses arising out of the escape of defendant and two others from the custody of two deputy sheriffs during transport to a state correctional institution. During the course of the events, one deputy was shot and seriously wounded. After reversal of the conviction by U. S. District Court granting habeas corpus relief, the matter was remanded for a new trial.

   This case was re-tried December 1, 1980 through December 5, 1980 before the Honorable R. Bruce Brumbaugh. Since the first trial, the victim of the shooting had died (of natural causes) and it became necessary to present certain evidence by way of prior recorded testimony. The defendant was re-convicted on all counts.

   I was sole trial counsel for the Commonwealth through conviction and post-verdict motions. The defendant was represented by Normal D. Callan, Esq., Assistant Public Defender, Highland Hall Annex, Blair County Courthouse, Hollidaysburg, Pennsylvania, 16648 (814-695-5541).

6. Commonwealth v. Vincent D. Caracciolo, C.A. 234 of 1982—This was a prosecution for intimidation of witnesses. The defendant was the alleged "enforcer" of a local organized crime family, charged with threatening a subpoenaed grand jury witness. The witness was wearing an electronic device at the time of the offense and therefore the entire conversation was intercepted and recorded by police and prosecutors.

   This case was significant in several ways. It was the first prosecution in this part of Central Pennsylvania to utilize consensual interception of conversations as evidence in a criminal trial pursuant to the Wiretapping and Electronic Surveillance Act. Further, it led to an agreement between the defendant and the Commonwealth to testify against other members of a corrupt organization targeted in a grand jury probe, including John M. Verilla, identified by the Pennsylvania Crime Commission as a "soldier" in the LaRocca crime family.

   Although the trial commenced on March 24, 1983 it terminated in the early stages because of the defendant's agreement to cooperate with the prosecution. I personally handled this case from the investigative stages, through preliminary hearing and the commencement of trial. The trial judge was the Honorable R. Bruce Brumbaugh. Defense counsel prior to trial was Harold E. Miller, Esq., Mellon Bank Bldg., Altoona, PA (814-943-1462), and at trial was John L. Doherty, Esq., 436 7th Avenue, Suite 1550, Pittsburgh, PA (412-471-8893).

18. Continued

7. In re Condemnation of Premises of Dean Garber, No. 595 C.P. 1980—This was an eminent domain proceeding wherein the Northern Blair County Regional Sewer Authority condemned a right-of-way for sewer construction and maintenance across Garber's property. Although this was neither an unusual nor a complex condemnation case, its result was unique to my experience in that a jury returned a verdict for the condemnor, awarding absolutely nothing to condemnee for the taking.

   Trial took place May 3 and May 4, 1982, before the Honorable Thomas G. Peoples, Jr., P.J. As solicitor for the Authority, I acted as sole trial counsel. The condemnee was represented by Frederick B. Gieg, Jr., Esq., 401 N. Logan Blvd., Altoona, PA (814-946-1606).

8. Suzanne H. Egan v. Robert F. Egan, No. 1063 C.P. 1981—This was an action in divorce. The significance of this case was that the defendant was a physician, and no Pennsylvania appellate authority was yet extant on the issue of whether a license to practice medicine constituted marital property under the Divorce Code of 1980, nor were guidelines yet established on the valuation of a medical practice.

   Hearing was held on December 9, 1982, before a Master, Edward S. Newlin. The record was supplemented by the taking of depositions of financial experts. The Master's Report recommended that certain assets of the medical practice be valued as marital property, but he declined to value the license as property, and he rejected the plaintiff's method of valuation which would have projected future income and reduced it to present value. This is consistent with subsequent case-law development.

   The undersigned represented defendant/physician through hearing and the filing of Exceptions, which were eventually withdrawn. The plaintiff was represented by William J. Haberstroh, 1116 - 12th Avenue, Altoona, PA (814-944-9486).

9. Commonwealth v. William C. Ermin et al., C.A. 930-935 of 1977—This was a prosecution of six (6) members of a motorcycle gang for Aggravated Assault and related offenses. After administering a severe beating to a rival, certain members of this gang dragged the victim to a well-travelled street where they left him semi-conscious, apparently hoping he would be struck by a passing vehicle.

   The difficulty in this prosecution was that the victim's testimony was largely uncorroborated, and his credibility and character subject to impeachment. Furthermore, most of the defendants presented alibi defenses.

   All defendants were convicted following a trial which took place before the Honorable Ellis W. VanHorn, Jr., Specially Presiding, between July 10 and July 11, 1978. I was sole counsel prior to and during trial. The defendants were represented by Harold E. Miller, Esq., Mellon Bank Bldg., Altoona, PA (814-943-1462).

18. Continued

10. Brady Construction Co. v. Northern Blair County Regional Sewer Authority (American Arbitration Association arbitration)—This was a dispute between a general contractor and a sewer authority arising from construction of a municipal sewer system. The dispute centered around certain change orders generated by the project engineer, and the extent to which they conformed to original plans for the system.

    Due to the unavailability to me of certain files and records, coupled with the need for prompt completion of the instant application, I have been unable to determine the names and addresses of the arbitrator and of claimant's counsel. I am likewise unable to set forth the amount of the award, other than to note that it was substantially lower than the amount claimed, and that the arbitrator rejected a claim for prejudgment interest.

    The Arbitration hearing was held on June 1, 1982, in Lewistown, Pennsylvania.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

Between 1981 and 1983, I was one of two special prosecutors assigned to an investigating grand jury, one of the first such county-wide investigations conducted outside of Philadelphia and Allegheny Counties pursuant to Pennsylvania's Grand Jury Act. This investigation led to the successful prosecution of a local organized crime "family," linked by the Pennsylvania Crime Commission to the LaRocca Family of Western Pennsylvania.

I personally conducted numerous grand jury sessions and prosecuted the first cases arising out of the investigation. During jury selection in Commonwealth v. Vincent Caracciolo, C.A. 234 of 1982 (Blair County), the defendant, the enforcer for the local crime family, agreed to become a Commonwealth witness and eventually testified in the successful prosecutions of others, including John M. Verilla, listed by the Crime Commission as a "soldier" in the LaRocca organization.

As District Attorney, I personally supervised successful criminal investigations into fiscal wrongdoing at (1) Altoona City Treasurer's office; (2) Altoona-Johnstown Catholic Diocese; (3) Altoona Area Vo-Tech School District.

I served as a managing partner of the law firm of Jubelirer, Carothers, Krier, Halpern and Smith between 1981 and 1983. During that period, I supervised personnel, provided fiscal management, and had responsibility for the firm's general operations.

During the late 1970's, I served as co-counsel with the Blair County District Attorney on three first degree murder prosecutions: Commonwealth v. Lee Irvin Green, Commonwealth v. Ronald Pfahler and Commonwealth v. Ronald Miller.

19. Continued

During the early 1980's, I served as solicitor for the Northern Blair County Regional Sewer Authority. At the time I was retained, the Authority was experiencing problems of fiscal management and dissension among participating municipalities. The possibility of default on a bond issue was real. I took steps to conciliate factions on the board, instituted litigation where necessary to collect sums owed to the Authority, and served as local counsel on a bond issue which restored the fiscal stability of the Authority.

I have been an active member of the Pennsylvania Supreme Court's Criminal Procedural Rules Committee since August, 1986. The Committee has the responsibility for drafting and recommending to the Court additions and amendments to criminal rules. I have been integrally involved in discussions, and the drafting, of new post-verdict motions rules which would, if adopted, dramatically change criminal post-verdict practice in Pennsylvania.

During my first three years on the Common Pleas Court bench, a pre-existing criminal court backlog was reduced from nearly 1,500 pending cases to a current inventory of approximately 300 cases. Since my appointment as Administrative Judge by the Chief Justice of Pennsylvania in July, 1987, the criminal court inventory has been reduced by more than one-half with new procedures implemented for both the conduct of pre-trial conferences and the disposition of post-verdict motions.

As Administrative Judge, I have commenced the streamlining of civil trial procedures which will lead to the disposition of approximately 2,000 old but pending cases. I have also engaged the National Center For State Courts to propose a case management plan for civil and domestic relations cases in the Court of Common Pleas of Blair County. Their report, recently received, is now under study.

Additionally, I have supervised the compilation of the first set of judicial opinions in Blair County which is intended to promote a more settled adherence to precedent, or at least greater consistency among judges of my court.

My work as Administrative Judge has received written commendation from the Court Administrator of Pennsylvania.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   I have a continuing financial arrangement with my former law firm, now Jubelirer, Carothers, Krier and Halpern, to the extent that they will be paying me installments in payment of my former partnership share the amount of One Thousand Nine Hundred Thirty-four and 30/100 ($1,934.30) Dollars on or about May 1 of each year through 1990, and the amount of Three Hundred Fifteen and 16/100 ($315.16) Dollars on or about February 10 of each year through 1992. These are prearranged amounts paid annually upon receipt by the law firm of annuities received in connection with the settlement of two personal injury cases.

   If advisable for purposes of obviating any possible conflict, real or apparent, I would make every effort to negotiate a single lump sum payment in full satisfaction of the firm's obligation to me.

   I have no other continuing financial interests as a result of any current or prior employment or business or professional association, except for my present membership in the Pennsylvania State Employees' Retirement System (PSERS) incident to my service as a Judge of the Court of Common Pleas.

   Spouse holds profit sharing and 401k through employer.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   My practice as a judge of the Court of Common Pleas has been to recuse myself, sua sponte, from any matter wherein there has existed a conflict of interest, or even the appearance of such conflict. These instances have arisen in cases involving former clients and where my former law firm has been representing a party before the Court. I would continue this practice so to avoid even an appearance of impropriety.

   It is unlikely that any categories of litigation or that any financial arrangements, other than the ongoing financial relationship with my former law firm as set forth above, will present conflicts-of-interest.

3. **Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   None

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Income received during 1987:

Commonwealth of Pennsylvania (salary)	$68,084.57
Saint Francis College (teaching compensation)	1,125.00
Pennsylvania State University (teaching compensation)	900.00
Jubelirer, Carothers, Krier & Halpern (deferred compensation)	2,249.46
Mid-State Bank (spouse's salary)	19,007.20
Freeport-McMoran Resource LP (dividends & interest)	630.00
Cencom Cable Income LP (interest)	172.00
Petrolane LP (dividends & interest)	100.00
Keystone Financial, Inc. (dividends)	1,128.03
Peoples Savings Bank of Worcester (dividends)	10.00
Kidder Peabody Tax Exempt Fund (interest)	95.77
La. Power & Light Pfd. (dividends)	316.00
Eaton Vance Tax Managed Fund (interest)	78.36
USX Corp. Pfd. (dividends)	308.12
Pa. School Board Authority bond (interest)	450.00
Johnstown Savings Bank (dividends)	60.00
Kidder Peabody Premium Account Fund (interest)	54.56
Illinois Power Pfd. (dividends)	94.50

Income received through June 30, 1988:

Commonwealth of Pennsylvania (salary)	$39,999.96
Pennsylvania State University (teaching compensation)	900.00
Jubelirer, Carothers, Krier & Halpern (deferred compensation)	4,282.79
Mid-State Bank (spouse's salary)	12,872.00
Keystone Financial, Inc. (dividends)	600.00
Kidder Peabody Tax Exempt Fund (interest)	9.48
Eaton Vance Tax Managed Fund (interest)	60.80
Freeport-McMoran Resource LP (dividends & interest)	375.00
USX Corp. Pfd. (dividends)	235.62
Johnstown Savings Bank (dividends)	60.00
Petrolane LP (dividends & interest)	102.00
Kidder Peabody Premium Account Fund (interest)	90.75
CenCom Cable Income LP (interest)	169.35
Chemical Bank (dividends)	152.80

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Financial statement attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

6. Continued

I have never held a formal position in a political campaign. Over the past eighteen (18) years, and prior to my ascension to the bench, I have volunteered in various political campaigns, doing everything from door-to-door canvassing, to writing speeches and transporting candidates. In the 1978 Pennsylvania primary, I served as Blair County coordinator for Richard L. Thornburgh in his campaign for Governor, seeking volunteers, transporting the candidate during visits to the County, and otherwise serving as County spokesman for the campaign.

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

   Since my ascension to the bench in December, 1984, I have been precluded by law and by ethical restriction from participating in some of the professional and charitable efforts to serve the disadvantaged that I was involved in as a practicing lawyer.

   Since 1985, however, I have been a board member of the Salvation Army of Altoona, and I have assisted at various functions sponsored by the Multiple Sclerosis Society and by Big Brothers/Big Sisters. I serve also on the advisory board of the Domestic Abuse Project of Altoona.

   While engaged in the practice of law, I served on the board of directors of Blair County Legal Services Corporation, attending regular meetings and, during one fiscal year, serving as a member of a budget committee.

   I have also served on the board of the Blair County Society for Crippled Children and Adults, and was appointed by Governor Dick Thornburgh in 1983 to the Governor's Advisory Committee to oversee Implementation of Commonwealth's Plan for Equal Opportunity in the State-Supported Institutions of Higher Education.

   As a practitioner in a small community for slightly more than eight years, I frequently extended legal services to low-income clients for reduced fees, or for no fee at all. Although these instances are too frequent to recount, nor are client records available from my former law firm, I can recall occasions when poor clients sought to compensate me by gift of such things as home-made apple butter, a shirt, or a card of thanks.

   I cannot recall ever having refused to represent a disadvantaged person, otherwise unable to secure legal representation, because he or she was unable to advance a fee.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates—through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?**

   I have belonged to Lion's Club which, I believe, still limits its membership to men. I had not been an active member for about ten years, and have resigned that membership.

2. Continued

I belong to Lodge No. 494, F&A.M., a masonic body. As with all masonic bodies, this fraternity is comprised only of men. Because I realize that any efforts on my part to change this practice would be futile, and for other personal reasons, I am considering resigning.

I am a member at the Spruce Creek Rod and Gun Club, and have held such membership since 1982. This small hunting and fishing club is limited to men. Until recently, I believed this limitation to have been through practical implementation of policies. However, the Club has recently published and distributed its Constitution and By-laws for the first time, and upon receipt of my copy, I learned of the membership restriction. I have a strong, sentimental attachment to this club. My first fishing experiences as a child were spent there with grandparents and other members of my family. My wife and I enjoy this rustic setting for picnics and relaxation.

Spruce Creek is small enough that individual efforts to open membership to women could, in time, meet with success. Although I am not aware of any woman who has previously submitted her name for membership, I would be willing to sponsor a woman applicant.

I do not belong to any organization that invidiously discriminates on the basis of race or religion.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Senators Heinz and Specter have appointed a selection commission which recommended me as a qualified candidate for nomination. Upon learning in December of 1987 that this committee was soliciting applications for a vacancy on the U. S. District Court for the Western District of Pennsylvania, I filed an application with the committee's chairman and was interviewed by the full committee in Pittsburgh on January 28, 1988.

It is my understanding that the committee recommended several names to the Senators.

I was also interviewed by officials of the Department of Justice in Washington, D.C., on February 11, 1988. Senators Heinz and Specter recommended me to fill the judicial vacancy by letter directed to the President on March 4, 1988.

I have been interviewed by agents of the Federal Bureau of Investigation (FBI) and by Jerome Shestack, Esq., a representative of the American Bar Association (ABA).

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

The judiciary should not be viewed as a "super legislature" to which recourse may be had when policy objectives are unattainable through the other branches of government. The Federal judiciary must remain self-conscious of the fact that its judges are unelected. The traditional role of judges, and the ethical restrictions that bind them, require that they be removed from the political considerations and the currents of public opinion which are the proper province of popularly-elected officials.

Judges must be guided by stare decisis, because the legal principles which guide them are less mutable than the exigencies of the political process which often compel legislative action. On issues of constitutional import, judges must look to the words of the relevant section, and then attempt to divine the intent of the Framers, before deciding what the Constitution requires.

To suggest that a judge has departed from the realm of grievance-resolution and entered the arena of problem-solution is a semantic distinction only. Every litigant who brings a grievance before the court views himself/herself as having a problem which requires a judicial solution. The real questions are whether or not the particular problem is judicially cognizable, and how many individual rights and duties will be affected by the court's decision.

The proper role of a judge is not to reach out, sua sponte, and seek either individuals or issues to be used as vehicles to accomplish specific policy objectives. However, it must be remembered that an individual litigant may present a cause of action which implicates the rights and duties of many. Just as it is not the role of the judiciary to actively reach out for policy issues to resolve, judges must not shrink from the adjudication of claims merely because a decision may somehow affect interests beyond those of the individual litigant.

5. Continued

Judges should not loosen jurisdictional requirements merely for the purpose of encouraging a particular claim or to be congenial to a specific litigant. As a noted former trial judge in Pennsylvania has observed: "Everyone should get the same strike zone." To do otherwise is not only to render one's jurisprudence a haphazard array of ad hoc decisions; it is to engage in an extremely personal jurisprudence which subordinates the rule of law to individual whim.

Judges must carefully strike a balance between efforts, on the one hand, to transform them into administrators with oversight responsibilities for other institutions, and the tendency, on the other hand, to view their directives as having been made in a vacuum. The judiciary is not an administrative body, and judges are ill-equipped and inadequately staffed to take on such functions. What the judiciary must concern itself with is the enforcement of its orders. Judges must not hesitate to enforce their orders, while at the same time, avoiding the micro-management which may subject them to criticism that they are usurping the functions of other agencies.

The judiciary must always be "activist" in the sense that they manage case inventories efficiently and dispose of matters promptly. But activism, whether conservative or liberal, must not give way to a judge's adoption of a personal agenda for the righting of wrongs or the correcting of bad law. The adjudicative function, particularly for a trial judge, is a constrained and disciplined process which must be governed by the substantive rules of stare decisis and by established procedural dictates. In the words of the late Justice Potter Stewart: "The mark of a good judge is a judge whose opinion you can read and...have no idea if the judge was a man or woman, Republican or Democrat, a Christian or a Jew, and, if a Christian, a Protestant of a Catholic. You just know he was a good judge."

COMMONWEALTH OF PENNSYLVANIA:
: SS
COUNTY OF BLAIR :

Personally appeared before me the undersigned authority, David B. Smith, who being duly sworn according to law deposes and says that the facts set forth in the foregoing are true and correct to the best of his knowledge, information and belief.

David B. Smith
David B. Smith

Sworn to and subscribed before me
this 2nd day of August, 1988.

Notary Public my comm expires 1-1-[illegible]

FINANCIAL STATEMENT

Individual

Bank ______ Date June 30, 1988

Name David B. (Brooks) & Karen H. Smith Social Security Number 188-38-4191 195-48-2160

Address 3008 Second Avenue, Altoona, PA Phone (814)946-4130

Business or occupation Judge/Commercial Loan Officer Age 36/30 Dependents 0

ASSETS

Cash on hand and in banks (A)	$10,464.16
U. S. Government securities (B)	1,500.00[1]
Other stocks and bonds (B)	83,281.25
Accounts and notes receivable (C):	
Due from relatives and friends	-0-
Due from others – good	4,890.70[2]
Due from others – doubtful	-0-
Real estate (D)	57,000.00
Automobiles	6,625.00[3]
Cash value of life insurance (E)	12,974.60
Other assets – itemize	
Pa.Pension(individual)	15,708.40[4]
Profit-sharing (spouse)	6,872.57[4]
IRA (individual)(G)	21,947.59
IRA (spouse)	13,035.37[4]
401k (spouse)	4,896.34[4]
Coins and collectibles	6,000.00
Total assets	$245,395.98

LIABILITIES AND NET WORTH

Notes due to banks (A)	$ 257.00
Notes due to relatives and friends (F)	-0-
Notes due to others (F)	-0-
Accounts and bills due (F)	1,000.00(est)
Unpaid income taxes	-0-
Other unpaid taxes and interest	-0-
Real estate mortgages payable (D)	-0-
Contract accounts payable (F)	-0-
Brokers margin accounts	-0-
Other debts – itemize	
(Monthly utility and household bills)	
Total liabilities	$ 1,257.00
Net worth	244,138.98
Total liabilities and net worth	$245,395.98

CONTINGENT LIABILITIES

As endorser, comaker, or guarantor	$ -0-
On leases or contracts	-0-
Legal claims	-0-
Federal income taxes	-0-
Other – list	
N/A	

ANNUAL INCOME

Salary	$
Commissions and bonuses	
Dividends	
Rental and lease income (net of operating expenses)	
Other – list	

(A) CASH IN BANKS AND NOTES DUE TO BANKS

NAME OF BANK	ON DEPOSIT	DUE BANKS	COLLATERAL (IF ANY)
Kidder Peabody (checking)	$ 5,980.22	$ 257.00	Unsecured loan from Mid-State Bank
Mid-State Bank (checking)	405.30		
Investment Savings & Loan	1,078.64		
Mid-State Bank	3,000.00		

[1] Value of savings bonds does not include (over) accrued interest.
[2] Annual installments to 1992 not reduced to present value.
[3] Does not include 1987 BMW 325 pursuant to lease/purchase plan.
[4] As of December 31, 1987.

FORM # 5-B572

(B) U.S. GOVERNMENT SECURITIES AND OTHER STOCKS AND BONDS

NO. OF SHARES OR FACE VALUE (BONDS)	DESCRIPTION	COST	MARKET VALUE
$3,000.00	U.S. Savings Bond (3)	$1,500.00	$1,500.00[1]
5 Units	Cencom Cable Income Partners	5,000.00	5,000.00
200 shares	Eaton Vance High Yield Muni Fund	2,036.00	1,900.00
300 shares	Freeport McMoRan Resource Partners	6,012.59	7,087.50
(schedule continued on attached page)			

(C) ACCOUNTS AND NOTES RECEIVABLE

BORROWER	WHEN DUE	BALANCE DUE	ORIGINAL AMOUNT	SECURITY (IF ANY)
		$	$	

(D) REAL ESTATE

DESCRIPTION	DATE ACQUIRED	TITLE IN—WHOSE NAME	COST	PRESENT VALUE	MORTGAGE	
					AMOUNT	HOW PAYABLE
Brick & frame dwelling	1/79	D.Brooks Smith & Karen H. Smith	$ 45,900	$ 57,000	$ N/A	N/A

(E) LIFE INSURANCE

AMOUNT	NAME OF COMPANY	BENEFICIARY	CASH VALUE	LOANS
$31,500	Northwestern Mutual Life	Spouse	$ 3,951.60	$ N/A
52,500	Northwestern Mutual Life	Spouse	6,099.84	N/A
25,000	Northwestern Mutual Life	Spouse	2,010.07	N/A
50,000	Northwestern Mutual Life	Spouse	913.09	N/A

(F) NOTES, CONTRACTS, ACCOUNTS, AND BILLS DUE

OWED TO	DATE	BALANCE DUE	WHEN DUE	PURPOSE OR COLLATERAL (IF ANY)
		$		

For the purpose of procuring credit from time to time, I furnish the foregoing as a true and accurate statement of my financial condition. Authorization is hereby given to the bank to verify in any manner it deems appropriate any and all items indicated on this application.

______ 19
DATE

SIGNATURE

(B) U.S. GOVERNMENT SECURITIES AND OTHER STOCKS AND BONDS (continued)

No. of Shares Or Face Value (Bonds)	Description	Cost	Market Value
150 shares	Chemical Bank (Pfd)	6,206.25	5,475.00
500 shares	Johnstown Savings Bank (common)	4,750.00	3,187.50
1,500 shares	Keystone Financial (common)		26,625.00
100 shares	Petrolane Partners (MLP)	2,050.00	2,000.00
40,000	Horsham Twp. PA Sewer (bond)	3,917.20	9,501.20
5,000	PA. State Pub. Sch. Auth (bond)	5,000.00	5,250.05
30,000	Radnor Twp. PA Sch. Auth (bond)	5,373.00	9,508.50
25,000	So. Fayette Twp. PA School (bond)	2,782.25	6,246.50
			$83,281.25

(G) HOLDINGS IN SELF-DIRECTED INDIVIDUAL RETIREMENT ACCOUNT

No. of Shares Or Face Value (Bonds)	Description	Market Value
4447	Webster Cash Reserve Fund	4,447.59
250 shares	Chemical Bank (Pfd)	9,125.00
200 shares	First Australia Prime Income	1,875.00
200 shares	First Exec. Dep. (Pfd.)	4,000.00
5 units	HLV Unit K/P Miller Realty	2,500.00
	TOTAL VALUE OF PRICED POSITIONS	$21,947.59

I. BIOGRAPHICAL INFORMATION

1. Name
Jay C. Waldman

2. Office and home address (name of law firm)

Office: Dilworth, Paxson, Kalish & Kauffman
2600 The Fidelity Building
Philadelphia, Pennsylvania 19109

Home: 2009 Spruce Street
Philadelphia, Pennsylvania 19103

3. Date and place of birth.
11/16/44 - Pittsburgh, Pennsylvania

4. Married to Roberta Landy Waldman
Educator & Program Management Consultant
Merrill Lynch & Co.
World Financial Center
New York, NY 10281

5. List each college and law school attended, including dates of attendance, degrees awarded and if you left any institution without receiving a degree, the reason for leaving.

University of Wisconsin, Madison, Wisconsin, 1962-1966, B.S. degree cum laude; University of Pennsylvania, Philadelphia, Pennsylvania 1966-1969, LL.B. degree.

6. The dates, names and addresses of law firms or offices, companies and governmental agencies with which you have been connected, and the nature of the connection with each.

Rose, Schmidt, Dixon & Hasley
900 Oliver Building
Pittsburgh, Pennsylvania 15222
Litigation Department Associate, 1970-71

Office of the U.S. Attorney for the Western District of Pennsylvania
633 U.S. Courthouse
Pittsburgh, Pennsylvania 15219
Assistant U.S. Attorney, 1971-75

U.S. Department of Justice
Tenth Street & Constitution Avenue N.W.
Washington, D.C. 20530
Deputy Ass't. Attorney General for the Criminal Division, 1975-77

Director, Thornburgh for Governor Cte. 1978
16th & Chestnut Streets
Philadelphia, Pennsylvania 19103

Counsel to the Governor of Pennsylvania
Capitol Building
Harrisburg, Pennsylvania 17101
1979-81

General Counsel of the Commonwealth of Pennsylvania
Capitol Building
Harrisburg, Pennsylvania 17101
1981-86

Dilworth, Paxson, Kalish & Kauffman
2600 The Fidelity Building
Philadelphia, Pennsylvania 19109
Partner, Litigation Department, 1986-present

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honoray degrees, and honorary society memberships that you believe would be interest to the Committee.

Elected a Fellow of the American Bar Foundation, 1986.

9. Bar Associations: List all bar associations, legal or judicial-related committees of conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association
Fellows of the American Bar Foundation
Federal Bar Association
Pennsylvania Bar Association
Philadelphia Bar Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

University of Pennsylvania Alumni
Gwilym Price Scholarship Fund
Union League of Philadelphia

None are active in lobbying before public bodies.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

U.S. Supreme Court - 1/10/77.
Third Circuit Court of Appeals - 9/17/72.
District of Columbia Court of Appeals - 6/6/77.
Supreme Court of Pennsylvania - 3/22/71.
Superior Court of Pennsylvania - 3/18/70.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Good, June 20, 1988

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

N/A.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Assistant U.S. Attorney, W. District of Pennsylvania, appointed, 1971-75.

Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, appointed, 1975-77.

Counsel to the Governor of Pennsylvania, appointed, 1979-81.

General Counsel of the Commonwealth of Pennsylvania, appointed, 1981-86.

Commissioner, Pennsylvania Convention Center Authority, appointed, 1986-91.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so the name of the judge, the court, and the dates of the period you were a clerk;

I served a clerkship-preceptorship with the Hon. Gwilym A. Price, Jr., Court of Common Pleas, Pittsburgh, PA., from September 1969 to May 1970.

2. whether you practiced alone, and if so, the addresses and dates;

I never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

Rose, Schmidt, Dixon & Hasley
900 Oliver Building
Pittsburgh, Pennsylvania 15222
Litigation Department Associate, 1970-71

Office of the U.S. Attorney for the Western District of Pennsylvania
633 U.S. Courthouse
Pittsburgh, Pennsylvania 15219
Assistant U.S. Attorney, 1971-75

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Tenth Street & Constitution Avenue N.W.
Washington, D.C. 20530
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Capitol Building
Harrisburg, Pennsylvania 17101
1979-81

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Harrisburg, Pennsylvania 17101
1981-86

Dilworth, Paxson, Kalish & Kauffman
2600 The Fidelity Building
Philadelphia, Pennsylvania 19109
Partner, Litigation Department, 1986-present

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

As an associate at Rose, Schmidt (1970-71), I performed research assignments, drafted pleadings and briefs, prepared witnesses, participated in conferences with clients and opposing counsel, and participated in pre-trial conferences and court proceedings.

As an assistant U.S. attorney (1971-75), I litigated a variety of civil, criminal and administrative cases, and argued a number of appeals, in the federal courts, as well as, several matters in the state courts. My primary areas of criminal law responsibility encompassed white collar crime, narcotics, extortion and civil rights cases. My primary areas of civil responsibility encompassed Federal Tort Claims Act, Federal Food & Drug Act, social security and veterans' affairs cases.

As deputy assistant attorney general (1975-77), I supervised the work of over 150 attorneys involved in organized crime, white collar crime, corruption and narcotics investigations and cases. This included participation in the structuring of major investigations, development of legal theories and trial tactics in major cases, and decisions on whether prosecutions should be initiated. I reviewed and approved affadavits and pleadings for court authorized electronic surveilance and grants of witness immunity. I lectured on trial tactics and advocacy, and appeared before the Congress for the Department on pending legislation and treaty ratifications.

As Counsel to the Governor (1979-1981), I provided legal advice and advice regarding developments in the law to the Governor. I reviewed and advised the Governor on legislation. I drafted executive orders, and reviewed applications for pardons and communications. I organized and supervised a merit selection system for judicial appointments.

As General Counsel of the Commonwealth (1981-86), I supervised the work of 280 Executive Branch attorneys. I participated directly in the development of legal theories, briefs and trial tactics in key cases, as well as, determining when cases should be initiated or settled. I reviewed and determined the constitutionality of legislation, and reviewed for legality all state regulations and contracts. I drafted executive orders, and provided legal advice to the Governor and Executive Branch officials. I reviewed all cases involving applications for pardons and commutations, or imposition of the death penalty. I supervised the Governor's judicial selection process. As General Counsel, I was also a member of the State Board of Finance & Revenue, which adjudicates tax disputes, and was chief administrative officer of the state correction system (Bureau of Prisons), Crime Victims Board, Juvenile Court Commission, and the Board of Commissioners on Uniform State Laws.

As a partner at Dilworth, Paxson, Kalish & Kauffman (1986-present), I am representing principally institutional clients involved in a variety of litigation. These matters include contract disputes, securities law claims; medical malpractice; health and other injury claims; and, request for injunctions.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

At Rose, Schmidt, our typical clients were large and medium size corporations and insurance companies, such as Consolidation Coal Company, Joy Manufacturing Company, West Penn Power Company, Coca-Cola Company and Chubb Insurance Group. I worked with litigation partners on cases involving tax, anti-trust, trademark infringement, contract and injury claims.

As Assistant U.S. Attorney, I generally worked with the F.B.I., I.R.S., Secret Service and Federal Bureau of Narcotics and Dangerous Drugs (FBNDD-later renamed The Federal Drug Enforcement Administration.) I litigated matters involving white collar crime, extortion, drug enforcement, public corruption and civil rights violations, as well as, civil cases including wrongful death, defamation and other injury claims.

As Deputy Assistant Attorney General, I generally worked with the F.B.I., D.E.A., I.R.S. and a number of U.S. Attorneys. I also worked closely with Assistant Attorney General Thornburgh, Associate Deputy Attorney General Giuliani and Deputy Attorney General Tyler, particularly on major organized crime, narcotics, public corruption and white collar crime matters. I represented the Criminal Division on the Attorney General's White Collar Crime Task Force, chaired by Judge Tyler.

As Counsel to the Governor, my only client, as such, was Governor Thornburgh. As general Counsel, I represented the Governor and the officers and agencies of the Executive Branch. I also worked closely with Attorney General Zimmerman. As such, I was involved in matters spanning virtually all areas of the law.

At Dilworth, Paxson, my clients generally have been large and medium size corporations and public institutions such as Merrill Lynch & Co., Trusthouse Forte, Inc., PATCO, Delaware River Port Authority, and Engelhard Corp. My primary areas of involvement have been the defense of contract claims, general corporate litigation and injury cases.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearance in court varied, describe each such variance, giving dates.

I appeared in court frequently during 1970-75, did not appear in court during 1976-85, and appeared in court occasionally during 1986-88.

2. What percentage of these appearances was in:

(a) federal courts; 95%
(b) state courts of record; 5%
(c) other courts. 0

3. What percentage of your litigation was:

(a) civil; 40%
(b) criminal. 60%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

20 cases as sole counsel; one as chief counsel; and 2 as associate counsel.

5. What percentage of these trials was:

(a) jury; 80%
(b) non-jury. 20%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

U.S. v. Faix, No. 73-282, W. Dist. of Pa. This case involved the prosecution of a well-known physician for dispensing prescriptions for payment to addicts for controlled drugs, without adequate examination or medical justification. It was one of the first such cases in the country, and resulted in the first holding by the Third Circuit that the Federal Comprehensive Drug Abuse and Control Act (Title 21 U.S.C. §841) could be constitutionally applied to physicians in the course of their practice. I was sole counsel for the government. The defendant was convicted, placed on probation and lost his license to practice. Trial was held in June 1974 before Judge Barron McCune in the U.S. District Court for the Western District of Pennsylvania. Opposing counsel was Malcolm Anderson, Esq., Pittsburgh, Pennsylvania, 412-281-4900.

U.S. v. Fiore, No. 72-1233, W. Dist. of Pa. This case involved the prosecution of a major hauler with reputed organized crime ties for criminal contempt of orders enforcing federal employee wage and hour requirements. It was the first case in the country where criminal sanctions were obtained for violations of the Fair Labor Standards Act. (Mr. Fiore was later indicted for conspiracy to commit murder.) The defendant was convicted and imprisoned. I was lead counsel for the government. Trial was held in January 1972 before Judge Joseph Willson, Western District of Pennsylvania. Co-counsel was Stephen Ernst, Esq., of the U.S. Department of Labor, Philadelphia Region. Opposing counsel was Harold Gondelman, Esq., Pittsburgh, Pennsylvania, 412-765-2500.

U.S. v. Samuel Harris, No. 72-81, W. Dist. of Pa. This case involved the prosecution of a major and notorious heroin and cocaine "wholesaler", with ties to New York organized crime figures, on circumstantial evidence of possession of cocaine. This case, and a subsequent net worth income tax evasion case which I developed, resulted in the removal of a major drug trafficker and the substantial disruption of one of the largest drug distribution networks in the region. The defendant was convicted and imprisoned. I was sole counsel for the government. Trial was held in September 1972 before Judge James Knox, W. Dist. of Pa. Opposing counsel was David O'Hanesian, Esq., Pittsburgh, Pa., 412-391-8407.

U.S. v. Elbert "Slim" Harris, No. 72-292, W. Dist. of Pa. This case involved the prosecution of a major drug trafficker and "enforcer" on circumstantial evidence of distribution of narcotics. The defendant was convicted and imprisoned. This case removed a major drug dealer from the area. I was sole counsel for the government. Opposing counsel was John Doherty, Esq., Pittsburgh, Pennsylvania, 412-765-2855. Trial was held in Marc 1973 before Judge Herbert Teitelbaum, W. District of Pennsylvania.

U.S. v. Kutler, No. 74-177, W. Dist. of Pa. This case involved the prosecution of the clandestine owner of a number of hardcore pornographic theatres in Ohio and Pennsylvania for interstate transportation of obscene material. The evidence, consisting largely of the tracing of financial records of shell corporations, showed links between the defendant and organized crime figures in New York, New Jersey and California involved in the production of pornography, extortion of independent adult theatre owners and acts of violence. This was the first successful federal obscenity prosecution in Pennsylvania in recent times, and provided a basis for further investigations and prosecutions of organized crime figures. The defendant was convicted and imprisoned. I was sole counsel for the government. Trial was held in November 1974 before Judge Barron McCune, Western District of Pennsylvania. Opposing counsel was Marjorie Hansen Matson, now deceased.

In re Estate of Auraana Lizenkon. This case involved competing claims for the estate of an intestate veteran between the U.S. Veterans Administration and a purported Soviet heir. There had been a number of similar cases in which documents appearing to establish the right to inherit under U.S. law had been produced (some cynics thought literally) by U.S.S.R. authorities on behalf of purported Soviet heirs who executed renunciations in favor of Soviet designees so the reputed heir need not appear. In all of them, the Soviet claimants had prevailed. (Under Soviet law, virtually all of the monies involved went to the Soviet Treasury.) This case marked the first time any challenging claimant produced evidence going beyond and questioning the Soviet documents. It was the first so-called "Iron Curtain estate case" in which the American claimant prevailed, and new standards of proof were adopted. The VA was awarded the estate and the award was upheld by the Pennsylvania Supreme Court (March Term - 1973 no. 62). I was sole counsel for the VA. Trial was held before Judge Joseph Boyle, Orphans Court of Allegheny County. Opposing counsel was Cyril Brain, Esq., Pittsburgh, Pennsylvania.

U.S. v. Menke, No. 71-172, W. District of Pennsylvania. This case involved the warrantless seizure of drugs and other evidence of importation of drugs from Asia by defendant from his home and automobile by U.S. Customs agents. The drug evidence was suppressed by the district court which was reversed by the Third Circuit after which defendant was convicted. This case marked the development of new law in the Third Circuit on consent searches. The trial judge was Judge Hubert Teitelbaum. Opposing counsel was Warren Keck, Esq., Greenville, Pennsylvania. I was sole counsel for the government. The case was first heard in January 1972 and remanded in March 1972.

U.S. v. Nolan, No. 72-280, W. Dist. of Pa. This case involved an armed extortion attempt. It was the first case in the Circuit in recent times and one of the few in the country where the defense of duress and coercion was advanced. It helped to develop the law in this area. The defendant was convicted and imprisoned. I was sole counsel for the government. Trial was held before Judge Barron McCune, Western District of Pennsylvania, in May 1973. Opposing Counsel was Lawrence Gaitens, Esq., Pittsburgh, Pennsylvania, 412-391-6920.

U.S. v. Shubert, No. 73-083, W. Dist. of Pa. This case involved a sensational extortion attempt against a major U.S. corporation. F.B.I. agents, one posing as a corporate official and carrying the demanded ransom money, pursued strategically placed instructions along a trail through three states. The trail ended in a wooded area near the Buffalo airport where agents confronted an armed, fully masked man waiting for the money. A shoot-out ensued, but the suspect escaped. After an intense investigation, this case was prepared from circumstantial evidence and a voice identification. The ability of the government to ultimately detect and convict this defendant materially furthered the deterrent effect of law enforcement. It removed a dangerous offender who was also a subject of the F.B.I. investigation into a TWA airplane bombing in New York. (This case was scripted for the television series, "The F.B.I." with Efrom Zimbalist.) Trial was held in September 1973 before Judge Gerald Weber, Western District of Pennsylvania. I was sole counsel for the government. Defense counsel was Edward Goebel, Esq., Erie, Pennsylvania.

Commonwealth of Pennsylvania v. Delaware Valley Citizens Council, No. 85-5, Supreme Court of the United States. This case involved a challenge to the award of attorneys fees in a Clean Air Act case in the Eastern District of Pennsylvania. The case resulted in the creation of new standards and law on the use by courts of so-called contingency multipliers in the award of fees under federal fee-shifting statutes. In rendering its opinion, the Court rejected the practice which had been authorized by a great majority of the circuit courts. Respondent's counsel was James Crawford, Esq., Philadelphia Pa., 215-751-2162. Kenneth Geller and Kathryn Oberly, office of the Solicitor General of the U.S., represented the government. (They are now at Mayer, Brown & Platt, Washington, D.C., 202-463-2000.)

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Significant legal activities involving litigation but not a trial include:

U.S. v. Ezrine, W. Dist. of Pa. (1974-75). I had sole responsibility for structuring and conducting a grand jury investigation that resulted in the defendant's indictment and eventual guilty plea to charges arising out of a multi-state bankruptcy fraud scheme. Defendant, a New York lawyer, operated through a variety of shell corporations, and was carried by the F.B.I. at the time as one of the major white collar crime subjects in the country. Defendant's activities bankrupted a number of clothing, sporting goods and department stores from the East coast to California. This case involved the first use in Pennsylvania and one of the early uses in the country of the Racketeer Influenced and Corrupt Organizations (RICO) Act.

U.S. v. Hutzler, W. Dist. of Pa. (1972). I had sole responsibility for conducting a grand jury investigation that resulted in the indictment and guilty plea of defendant, a Pittsburgh police officer, for violation of federal civil rights laws. It was determined that the defendant was physically assaulting and beating suspects for reasons related to their race. Defendant was removed permanently from police work, and an apparant deterrent established as the number of complaints of this type of conduct dropped dramatically.

U.S. v. Westinghouse, W. Dist. of Pa. (1973). In this case I was lead counsel for the U.S. Navy in a suit to recover for inadequate performance in the supply of systems for nuclear submarines. The case was ultimately settled in a manner which offered, at the time, some deterrence against overcharging and supplying inadequate materiel by defense contractors. I received a commendation from Admiral Rickover.

Camiel v. Thornburgh (1981). I participated substantially in the pleading and briefing process in this case where the state appellate courts upheld the right of a Governor to suspend without pay an official, even of an independent state agency, upon indictment for a felony.

Commonwealth of Pennsylvania v. Federal Nuclear Regulatory Commission (NRC), (1984). I participated substantially in preparing the petition, affadavits and brief to obtain a temporary stay from the U.S. Supreme Court of an NRC order restarting one of the Three Mile Island nuclear power plants until certain safety issues were addressed by the NRC.

Significant legal activities that did not involve litigation include:

Representing the Criminal Division on the Attorney General's White Collar Crime Task Force (1976-77) which developed plans for combatting fraud in government related programs.

Representing the Criminal Division on the task force that reviewed and resolved the law suit by the Socialist Workers Party against the F.B.I. (1976), and led to the development of standards for surveillance and infiltration of radical and extremist groups.

Helping to draft and representing the Department of Justice before the Congress on an anti-terrorism treaty in 1976.

Helping to draft amendments to and testifying before the Congress on law enforcement related provisions of the Tax Reform Act of 1976.

Representing the Criminal Division on a joint Justice-State-Commerce Department task force to review allegations and propose legislation regarding foreign corporate bribery (1976).

Supervisory responsibility for a number of major investigations and cases (1975-77), including the Hoffa disappearance and spin-off cases, the post-Rockefeller Commission Report investigation into CIA activities, the Patricia Hearst - SLA case, and the Tongsun Park case.

Drafting and implementing an Executive Order imposing the first code of ethics for Pennsylvania officials and employees (1979).

Drafting an Executive Order establishing an affirmative action program for minority contractors (1980).

Drafting and implementing an Executive Order establishing a merit review and selection process for state judicial appointments (1979).

Reviewing for approval or disapproval all cases involving applications for pardons or commutations, as well as, imposition of the death penalty (1979-86).

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   I would expect to receive a repayment of my capital contributions to my law firm as well as, some severance in lieu of compensation for pending matters. Under the firm partnership agreement, this payment may be made over a period of five years, although I have been advised that this could and likely would be done within one year in my case.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I would recuse myself in any case where my law firm had an interest or a member of the firm was a participant during the period of any pay-out, and for a reasonable period thereafter to avoid even an appearance of a conflict. I would recuse myself in any matter in which I was involved in any way while in private practice. I have no stock, private business interests or other financial arrangements and thus this area of potential conflict is absent. I would however, recuse myself from any case that any fair-minded and reasonable person could determine posed a conflict or potential conflict of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interests, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   1987: compensation as a partner at Dilworth, Paxson, Kalish and Kauffman-$140,000; compensation for service as a Pennsylvania Convention Center Authority commissioner-$125 per month. 1988: compensation as a partner at the Dilworth firm-$ 65,847 ; compensation for service as a Convention Center Authority commissioner - $125 per month.

5. Please complete the attached financial net work statement in detail (Add schedule as called for).

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   I was director of the 1978 campaign of Governor Dick Thornburgh in Pennsylvania.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	11,142		
U.S. Government securities—add schedule (Savings Bonds)	17,000		
Listed securities—add schedule			
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule (residence)	255,000		
Real estate mortgages receivable			
Autos and other personal property	73,000		
Cash value—life insurance			
Other assets—itemize:			
law firm capital account	14,000		
Total assets	370,142		

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured			
Notes payable to relatives			
Notes payable to others			
Accounts and bills due	3,973		
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule (residence)	202,000		
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	205,973		
Net worth	164,169		
Total liabilities and net worth	370,142		

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)			
Are you defendant in any suits or legal actions?			
Have you ever taken bankruptcy?			

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   Fifteen of my eighteen years in practice have been in public service. I held public positions that prevented even pro bono representation of private parties. At the same time, however, I believe that I conducted my public practice and performed my public responsibilities in a manner that reflects the considerations underlying Canon 2.

   I supported the creation of a federal public defenders office for the Western District of Pennsylvania to provide representation to indigent criminal suspects and defendants. I supported and helped obtain state appropriations for the Community Legal Services program which provides legal representation to the poor in civil matters. I conducted an investigation into allegations of police brutality against blacks, mostly poor, in several districts in Pittsburgh. It resulted in the indictment and removal of an officer determined to be a principal offender. I helped to draft and secure passage of a law creating special deterents to crimes against the elderly, and an Ethnic Intimidation law which penalizes acts of harassment, vandalism and intimidation motivated by racial, religious or ethnic enmity. I oversaw the expansion of programs to help crime victims, including the creation of rape and domestic abuse centers. I drafted an Executive Order initiating an affirmative action program for minority contractors which led to a 1000% increase in the award of state contracts to minority firms.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

   I have been a member of the Union League of Philadelphia since 1984. At that time the by-laws limited memberships to men. In 1986, a resolution to amend the by-laws to permit the admission of women members was proposed and adopted by two-thirds vote. I supported the resolution. A number of state and federal judges are members of the club.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is a bi-partisan commission of lawyers and non-lawyers which recommends candidates to the senators. Yes, the commission recommended my nomination. I was advised in April by Senator Specter that a vacancy was about to occur in the Eastern District of Pennsylvania as Judge Huyett had indicated an intention to take senior status. The Senator indicated that if I was interested, he would like me to put my name forward and that he would be supportive. Senator Heinz indicated that he approved provided I was recommended by the Senator's selection committee which later occurred. I was advised by Justice that my name had been submitted and that I would receive various forms to be filled out for use by the F.B.I. and ABA in conducting their background inquiries. I was interviewed by the F.B.I. and ABA. I was advised by the White House and Justice that my name had been formally placed in nomination and that I should forward this questionaire to the Senate.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "Judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch was usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

A. A tendency by judiciary toward problem-solution rather than grievance-resolution;

I believe that this criticism is somewhat justified, although in resolving certain types of grievances the courts are creating precedent for the future resolution of generic problems which is an appropriate function of our legal system. Courts should not however, reach beyond the issues of fact and law presented by a given case to address a broader problem of which the particular grievance being litigated may be symptomatic.

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

I believe that this has been a valid criticism and has been manifest particularly in certain class actions. I sense, however, that there is a movement away from that tendency.

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

I believe that courts too often have had this tendency. The relief fashioned by a court should not exceed that which is necessary to rectify the particular wrong which a plaintiff or plaintiffs have established. In going beyond this point, courts have intruded into the domain of the other branches of government.

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

I believe that this has been a valid criticism. I believe, however, that there has been some movement away from this tendency, although I do not know whether this reflects a refinement of judicial philosophy or merely a response to the logistics of case-loads. In any event, I believe that courts should strictly adhere to the jurisdictional requirements imposed on them.

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I believe that this criticism is valid. Courts have an obligation in the context of a case properly before them, to determine whether actionable or unconstitutional conditions exist and to order appropriate relief. However, in directly administering that relief rather than imposing that obligation on those with official administrative responsibility for the institution in question, courts are exceeding their role and intruding into executive functions.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

Chancellor (Robert) Leon Jordan

1. Full name (include any former names used).

   Robert Leon Jordan

2. Address: List current place of residence and office address(es).

   Residence: 605 Crestview Drive
   Johnson City, Tennessee 37601

   Office: Downtown Centre Courthouse
   Johnson City, Tennessee 37604

3. Date and place of birth.

   June 28, 1934
   Woodlawn, Tennessee 37191

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Dorothy Wilson Rueter Jordan
   Employment: Veterans Administration Hospital
   Mountain Home, Tennessee 37684
   Married: September 8, 1956

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   David Lipscomb College
   Nashville, Tennessee
   1952-53--Transferred to Tennessee Tech University due to finances and to join Army ROTC

   Tennessee Tech University
   Cookesville, Tennessee
   1953-54--Volunteered for Draft to qualify for G.I. Bill which was to be phased out in January 1955

   The University of Tennessee
   Knoxville, Tennessee
   1956-58--College of Business, BS in Finance
   1958-60--College of Law, JD

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer,

director, partner, proprietor, or employee since graduation from college.

1980-present--Chancellor, First Judicial District of Tennessee
Downtown Centre Courthouse
Johnson City, Tennessee 37604

1971-1980--Bryant, Price, Brandt, Jordan & Fox
Suite 500, First American Bank Building
Johnson City, Tennessee 37601
Partner--general practice of law

1969-1971--The Commercial National Bank of Pensacola
Pensacola, Florida
Vice-President and Trust Officer

-and-

First National Bank of Milton
Milton, Florida
Trust Officer

Head of both Trust Departments, total management responsibility for all phases of trust work. (Both banks are now a part of Sun Trust Bank).

1966-1969--First Peoples Bank (now First American Bank)
Johnson City, Tennessee 37601
Trust Officer in charge of Trust Department. Complete Management responsibility for all phases of Trust Department.

1964-1966--Green & Green
Attorneys at Law
Fountain Square
Johnson City, Tennessee 37601
Associate Attorney--general practice of law with primary emphasis on civil law.

1962-1964--Frontier Refining Co. and subsidiaries (now Husky Oil)
4040 East Louisiana Avenue
Denver, Colorado
Special Representative; Dealer; Division Manager; Sales Promotion Manager. Duties consisted of assisting division managers in the operations and sales management of company-owned and operated, and leased gasoline service stations. Later placed in charge of separate discount division, was General Manager of same. Sales Promotion Manager, where duties consisted of planning and organizing sales promotions and sales programs, including product information for company. (Located in both Denver, Colorado and Miami, Florida.)

For approximately three months during this time period, I was Sales Manager for:

Emerson Tire Co.
2540 Northwest 74th Street
Miami, Florida

1960-1961--Goodpasture, Carpenter, Dale & Woods
American Trust Building
Nashville, Tennessee
Associate - general practice including investigation, research and trial work in lower courts - practice limited to civil law.

(This firm no longer exists. Person to contact is:
William H. Woods, Esq.
Trabue, Sturdivant & DeWitt
27th Floor - L & C Tower
Nashville, Tennessee 37219-2298)

7. Military Service: Have you had any military service: If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes. August 16, 1954 - August 1, 1956
U. S. Army, PFC, US53228260
Honorable Discharge

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

U. S. Army, Honor Soldier - Bremerhaven Port of Embarkation; Boss of the Year 1982 (chosen by Legal Secretaries Association of Washington/Carter Counties, Tennessee); Kiwanian of the Year, 1986-1987

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Member: Tennessee Bar Association; Tennessee Judicial Conference, Secretary 1986-1987; Executive Committee 1988-89.

Former member: American Bar Association; Washington County Bar Association, President Elect 1980; Tennessee Trial Lawyers Association; The University of Tennessee College of Law Board of Advisors, 1978-80; Tri-Cities Estate Planning Council, President Elect 1969.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Member: Metropolitan Kiwanis Club (Past President, Director, Kiwanian of the Year 1986-1987); Johnson City-Washington County Area Chamber of Commerce; Johnson County Chamber of Commerce

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such membership lapsed. Please explain the reason for any lapse of

membership. Give the same information for administrative bodies which require special admission to practice.

The Supreme Court of Tennessee
July 23, 1960

The United States District Court
Middle District of Tennessee
May 22, 1961

The United States District Court
Eastern District of Tennessee
October 25, 1965

12. Published Writings: **List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

    None.

13. Health: What is the present state of your health. List the date of your last physical examination.

    Excellent -- May 1988

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

    I was appointed Chancellor of the First Chancery Division (now First Judicial District) by Governor Lamar Alexander on November 14, 1980.

    I was elected Chancellor in August 1982 to an eight-year term by defeating my opponent by a margin of over 11,000 votes.

    I was elected Presiding Judge of the First Judicial District in 1986 and am now serving in that capacity.

    The trial courts of general jurisdiction in Tennessee are the Chancery and Circuit Courts. Since 1984 in the First Judicial District, the judges have interchanged on a regularly scheduled basis. I have tried civil cases (both jury and non-jury) of every nature in both Chancery and Circuit Courts.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your sub-

stantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

See attached Schedules A and B.

16. Public Office: **State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

None

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and, if so, the name of the judge, the court, and the dates of the period you were a clerk;

No

2. whether you practiced alone, and if so, the addresses and dates;

No

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

1960-1961 - Goodpasture, Carpenter, Dale & Woods
American Trust Building
Nashville, Tennessee
Associate--(This firm no longer exists. The person to contact is: William H. Woods, Esq., Trabue, Sturdivant & DeWitt, 27th Floor - L & C Tower, Nashville, Tennessee 37219-2298.)

1964-1966 - Green & Green
Fountain Square
Johnson City, Tennessee 37601
Associate

1971-1980 - Bryant, Price, Brandt, Jordan & Fox
Suite 500, First American Bank Building
Johnson City, Tennessee 37601
Partner

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

General civil practice.

As an associate with Goodpasture, Carpenter, Dale & Woods, a firm that had a broad clientele, including insurance practice, I assisted the partners in preparation for trials, assisted in trials in federal and state courts, and tried cases in General Sessions Court.

As an associate with Green & Green, I practiced the general practice of civil law with emphasis on personal injury, worker's compensation, real estate and domestic relations.

As a partner with Bryant, Price, Brandt, Jordan & Fox, I continued the general practice of civil law.

2. Describe your typical former clients, and mention the areas, if any, in which you specialized.

Banks, savings and loan associations, newspapers, gasoline distributors, manufacturers, contractors, realtors, doctors and dentists, individuals, and professional, civic and business organizations.

Tennessee does not recognize specialization; however, I enjoyed the largest estate planning and probate practice in the area. I was the most active member of the firm in the areas of commercial law, bankruptcy, labor law and domestic relations.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court regularly. Court matters required approximately 25% of my time. I practiced in General Sessions, City, Juvenile, Probate, Circuit, Chancery and Federal Courts.

2. What percentage of these appearances was in:
(a) federal courts--10% including Bankruptcy Court;
(b) state courts of record--45%;
(c) other courts--45%.

3. What percentage of your litigation was:
   (a) civil--98%
   (b) criminal--2%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

   150 - sole counsel
   50 - associate counsel

5. What percentage of these trials was:
   (a) jury--20%
   (b) non-jury--80%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and the date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    (a) the date of representation;
    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
    (c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

    See attached Schedule C.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

    The primary focus of my legal practice was in the fields of commercial law, estate planning and administration, and labor law.

    From 1961 to 1964, I worked in the oil industry. The knowledge acquired there became an asset when the oil crisis occurred in the early Seventies and suppliers cut off independent oil marketers in the area. I researched the law in the field which was primarily in the Code of Federal Regulations and was able to obtain import quotas for several marketers. They were then able to stay in business.

From 1966 to 1971, I worked as a trust officer in three banks, one in Johnson City, Tennessee, and the others in Pensacola and Milton, Florida. This gave me the opportunity to learn the estate planning and administration area of law. When I returned to private practice in 1971, I became involved in the Tri-Cities Estate Planning Council. When I went on the Bench, I enjoyed the largest estate planning and administration practice in the area. I graduated from the American Bankers Association's National Trust School and attended many seminars, including one week at the University of Wisconsin on the Tax Reform Act.

In the commercial law field, our firm represented a bank, a savings and loan association, the Federal Land Bank, a federal credit union and a major finance company. We also were area attorneys for an out-of-state bank that purchased considerable dealer paper in the area. I assisted in the planning and development of the financing arrangements with many of the bank's customers. I helped draft contracts, notes and deeds of trust used daily in the local financial community. I was trustee on hundreds of deeds of trust and foreclosed many. I attended a week long continuing education seminar at the University of Wisconsin on the new Bankruptcy Act. Also, I attended many shorter CLE programs in commercial and business related subjects. In addition to my commercial practice, I was counsel to the Johnson City Homebuilders Association and to the Johnson City Board of Realtors.

Our firm represented many industries in the area. We advised our clients and helped negotiate labor contracts, disputes and strikes. For the smaller companies we were primary counsel. For some national companies we were local counsel. I have participated from the Board room to the picket line to the courts in such matters.

We represented a chain of newspapers located in Tennessee. Primary counsel for many years was a senior partner who retired and, upon his retirement, I became primary counsel.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

Chancellor (Robert) Leon Jordan

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I will follow the law, 28 U.S.C. § 455 and honor the Code of Judicial Conduct.

   The only conflicts of interest I can foresee would be as a result of my stock holdings. I am prepared to dispose of my stocks that represent a possible conflict of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more.

   See attached Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

   See attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   I was elected Chancellor of the First Chancery Division (now First Judicial District) of Tennessee in 1982.

AO-10
Rev. 1/87

FINANCIAL DISCLOSURE REPORT

Annual Report Due by May 15 from Judicial Officers and certain Judicial Employees (28 USCA App. I, §§ 301-309)

Person Reporting (Last name, first, middle initial) Jordan, Robert L.	Court or Organization United States District Court Eastern Dist. of Tennessee	Date of Report 7-26-88
Title United States District Judge	Date of Entry/Nomination/Termination (only if initial or final report) July 25, 1988	Reporting Period (Calendar year, or inclusive dates) 1-1-87 to 6-30-88
Home or office address Home: 605 Crestview Dr. Johnson City, TN 37601	Office: Downtown Centre Court-house Johnson City, TN 37604	

IMPORTANT NOTES: *Please read the instructions accompanying this form. The report should include information pertaining to your spouse and dependent children, if any. Attach additional sheets if needed, identifying each attachment by showing your name, the date of the report, and the section(s) being completed.* **Complete all sections, checking the NONE box for each section where you have no reportable information.** *Compare and reconcile this report with last year's and list items in the same order as last year. Type or print clearly. Sign on last page.*

I. POSITIONS. *(Reporting individual only; see pp. 15-16 of Instructions.)*

☐ NONE (No reportable positions)

POSITION	NAME OF ORGANIZATION/ENTITY
1. Chancellor	State of Tennessee
2. Partner	Jordan Farm
3. Executor	Mother's Estate (Josie B. Jordan)
4. Secretary	Tenn. Judicial Conference 1986-87
5. Executive Committee	Tenn. Judicial Conference
6. Partner	Johnson City Investment Club
7. Director	Metro Kiwanis

II. AGREEMENTS. *(Reporting individual only; see p. 17 of Instructions.)*

DATE — PARTIES AND TERMS

☒ NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. *(Partial disclosure for spouse; see pp. 18-20 of Instructions.)*

☐ NONE (No reportable non-investment income)

DATE (Honoraria only)	SOURCE AND TYPE	GROSS INCOM (yours, not spouse
1 1-1-87 to 6-30-88	State of Tennessee--Judicial Salary	$90,900.00
2 1-1-87 to 6-30-87	Farm partnership	$ 661.12
3 1-1-87 to 6-30-87	Veterans Administration (S)	$ --
4		$
5		$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting: Jordan, Robert L.

Date of Report: 7-26-88

IV. REIMBURSEMENTS and GIFTS--transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

☒ NONE (No such reportable reimbursements or gifts)

	SOURCE	DESCRIPTION
1		
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS. *(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)*

☒ NONE (No such reportable gifts)

	SOURCE	DESCRIPTION	VALUE
1			$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 22-24 of Instructions.)*

☐ NONE (No reportable liabilities)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	American General Life	Policy loan	K
2			
3			
4			
5			
6			
7			

* VALUE CODES:
J = $0 to $1,000
K = $1,001 to $5,000
L = $5,001 to $15,000
M = $15,001 to $50,000
N = $50,001 to $100,000
O = $100,001 to $250,000
P = over $250,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting: Jordan, Robert L.

Date of Report: 7-26-88

VII. INVESTMENTS and TRUSTS--Income, value, transactions.

(Includes those of spouse; partial disclosure for dependent children; see pp. 24-35 of Instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure.	B. Income during period		C. Gross value at end of period		D. Transactions during period (Reporting individual and spouse)				
						If not exempt from disclosure			
	Amt. Code[1] (A-H)	Type (e.g., div.)	Value Code[2] (J-P)	Value Method Code[3] (Q-W)	Type (e.g., sold)	Date: Month-Day	Value Code[2] (J-P)	Gain Code[1] (A-H)	Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1 American Teleph. Comm. (J)	B	Div.	L	T					
2 Baxter International (J)	A	Div.	K	T					
3 First Virginia Bank (J)	B	Div.	M	T					
4 General Electric (J)	B	Div.	K	T					
5 Suntrust Banks (J)	B	Div.	M	T					
6 National Commerce Bancorp(J)	D	Div.	O	T					
7 Criterion Lowery (J)	B	Div.	L	T					
8 Putnam Int. Equity (J)	C	Div.	L	T					
9 Security Equity (J)	B	Div.	K	T					
10 Security Omni (J)	A	Div.	J	T					
11 Geo. Washington S&L (J)	A	Div.	K	W					
12 Southern Title Ins.	A	Div.	J	W					
13 Merrill Lynch Ready Acct.(J)	B	Div.	M	T					
14 Merrill Lynch MIT-9 (J)	B	Int.	L	T					
15 Home Federal S & L (S)	B	Div.	M	T					
16 Johnson City Inv. Club	A	Div.	J	T	(See attached Schedule 1)				
17 Schlumberger Ltd.	A	Div.	K	T	Sold				
18 Hewlett Packard	A	Div.	L	T	Sold				
19 USX Corp.	A	Div.	L	T	Sold				
20 Pittston Co.	A	Div.	K	T	Sold				Continued.....

1 Income/Gain Codes: A = exempt ($0 to $100) B = $101 to $1,000 C = $1,001 to $2,500 D = $2,501 to $5,000 E = $5,001 to $15,000 F = $15,001 to $50,000 G = $50,001 to $100,000 H = over $100,000

2 Value Codes: J = exempt ($0 to $1,000) K = $1,001 to $5,000 L = $5,001 to $15,000 M = $15,001 to $50,000 N = $50,001 to $100,000 O = $100,001 to $250,000 P = over $250,000

3 Value Method Codes: Q = Appraisal R = Cost (real estate only) S = Assessed value T = Cash/market U = Book value V = Other W = Estimated

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting: Jordan, Robert L.

Date of Report: 7-26-88

VII. INVESTMENTS and TRUSTS--income, value, transactions. *(Includes those of spouse; partial disclosure for dependent children; see pp. 24-25 of Instructions.)*

A.

	A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure.	B. Income during period		C. Gross value at end of period		D. Transactions during period (Reporting individual and spouse)				
		Amt. Code¹ (A-H)	Type (e.g. div.)	Value Code² (J-P)	Value Method Code³ (Q-W)	Type (e.g. sold)	If not exempt from disclosure: Date: Month-Day	Value Code² (J-P)	Gain Code¹ (A-H)	Identity of buyer/seller (if private transaction)
	☐ NONE (No reportable income, assets, or transactions)									
21.	1 Middle South Utilities	A	Div.	L	T	Sold				
	2 INTEREST INCOME									
1.	3 Geo. Washington S & L Johnson City, TN (J) and J/	E	Int.	N	T					
2.	4 w/brother (CDs & savings) First Federal S & L (J/Bro.)	D	Int.	N	T					
3.	5 Clarksville, TN (CDs) 1st American Bank (J)	B	Int.	L	T					
	6 Johnson City, TN (CDs, money market & checking)									
4.	7 Home Federal S & L (J) ~~Johnson City, TN (CDs/savings)~~	B	Int.	L	T					
5.	8 Bank of Tennessee (J) (CDs)	C	Int.	N	T					
	9 Johnson City, TN									
6.	10 Merrill Lynch (J) Johnson City, TN	C	Int.	M	T					
	11 (Ready Asset Trust)									
7.	12 Leader Federal (J) Johnson City, TN (CDs)	B	Int.	M	T					
8.	13 Hamilton Bank (S) ~~Johnson City, TN (checking)~~	B	Int.	K	T					
	14 &(CD--closed)									
	15 DEFERRED COMPENSATION--STATE OF TENNESSEE									
1.	16 Plan I - 457	C	Int.	N	T					
2.	17 Plan II - 401K	C	Int.	M	T					
	18									
	19									
	20									

Continued.....

1 Income/Gain Codes:	A = exempt ($0 to $100) E = $5,001 to $15,000	B = $101 to $1,000 F = $15,001 to $50,000	C = $1,001 to $2,500 G = $50,001 to $100,000	D = $2,501 to $5,000 H = over $100,000
2 Value Codes:	J = exempt ($0 to $1,000) N = $50,001 to $100,000	K = $1,001 to $5,000 O = $100,001 to $250,000	L = $5,001 to $15,000 P = over $250,000	M = $15,001 to $50,000
3 Value Method Codes:	Q = Appraisal U = Book value	R = Cost (real estate only) V = Other	S = Assessed value W = Estimated	T = Cash/market

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
Jordan, Robert L.	7-26-88

VII. INVESTMENTS and TRUSTS--income, value, transactions. *(Includes those of spouse; partial disclosure* B. *for dependent children; see pp. 24-35 of Instructions.)*

	A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure.	B. Income during period		C. Gross value at end of period		D. Transactions during period (Reporting individual and spouse)	If not exempt from disclosure			
		Amt. Code[1] (A-H)	Type (e.g., div.)	Value Code[2] (J-P)	Value Method Code[3] (Q-W)	Type (e.g., sold)	Date: Month-Day	Value Code[2] (J-P)	Gain Code[1] (A-H)	Identity of buyer/seller (if private transaction)
	☐ NONE (No reportable income, assets, or transactions)									
1	IRAs									
2	1. Merrill Lynch--IRAs									
3	(1)Baxter International	A	Div.	K	T					
4	(2)General Electric	B	Div.	K	T					
5	(3)American Greeting Corp.	A	Div.	K	T					
6	(4)First American Corp. TN	B	Div.	L	T					
7	(5)Suntrust Banks	B	Div.	M	T					
8	(6)Merrill Lynch Ret. Acct.	B	Div.	L	T					
9	2. Janus Fund--IRA	B	Div.	K	T					
10										
11										
12										
13										
14										
15										
16										
17										
18										
19										
20										

[1] Income/Gain Codes: A = exempt ($0 to $100) B = $101 to $1,000 C = $1,001 to $2,500 D = $2,501 to $5,000 E = $5,001 to $15,000 F = $15,001 to $50,000 G = $50,001 to $100,000 H = over $100,000

[2] Value Codes: J = exempt ($0 to $1,000) K = $1,001 to $5,000 L = $5,001 to $15,000 M = $15,001 to $50,000 N = $50,001 to $100,000 O = $100,001 to $250,000 P = over $250,000

[3] Value Method Codes: Q = Appraisal R = Cost (real estate only) S = Assessed value T = Cash/market U = Book value V = Other W = Estimated

FINANCIAL DISCLOSURE REPORT (cont'd)	Name of Person Reporting	Date of Report
	Jordan, Robert L.	7-26-88

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. *(Indicate section of Report.)*

☒ Check to affirm that differences in investments from those reported in prior year are exempt from disclosure.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

Signature Robert Lee Jordan

Date 7-27-88

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (28 U.S.C.A. APP. I, § 304, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

1. *Mail signed original and 4 additional copies to:*

   Judicial Ethics Committee
   Administrative Office of the
   United States Courts
   Washington, DC 20544

2. *Deliver one copy to the Clerk of the Court on which you sit or serve. (Judicial employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center, need not file a copy with any court.)*

JOHNSON CITY INVESTMENT CLUB

Liquidating Statement as of 6-23-88

	No Shares	Cost Per Shr	Total Cost	Present Shr Val	TOTAL VALUE NO
ALCOA	200	$47.80	$9,559.19	$52.75	$10,550.0
Eastman Kodak	500	44.48	22,238.66	45.375	22,687.5
First American Bank	1,200	27.90	33,480.71	26.00	31,200.0
First Virginia Bank	750	10.67	8,000.00	25.625	19,218.7
Hanson Trust	500	14.28	7,141.73	12.625	6,312.5
Home Federal S&L	1,500	14.06	21,094.19	18.375	27,562.5
JB Hunt Transport	600	20.22	12,131.19	19.25	11,550.0
Ideal Basic Cement	400	2.67	1,070.40	2.75	1,100.0
McDonald Corporation	200	44.38	8,875.75	46.00	9,200.0
Mylan Laboratories	1,200	12.71	15,251.91	13.00	15,600.0
Nucorr Corporation	200	38.05	7,610.13	41.875	8,375.0
Pfizer Corporation	200	53.35	10,669.00	52.125	10,425.0
Suntrust Corporation	350	22.68	7,937.13	23.75	8,312.
Walmart Corporation	200	29.32	5,863.56	29.50	5,900.0
U. S. Biosciences	40	0	0	?	?
Total Cost			$170,923.55		
Total Value Now					$187,993.
Credit with Merrill Lynch					2,797.0
Total Value of Club as of 6-23-88					$190,790.

Shares in Club 1,485.426 with value of $128.44 each; $10.00 ;buys .078 Shar

SCHEDULE 1

III. GENERAL (PUBLIC)

Chancellor (Robert) Leon Jordan

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

   Prior to 1972 when the Public Defender's Office was established in Washington County, members of the Bar were appointed by the Court to represent indigent defendants. I accepted all appointments by the Court. The Public Defender's Office was abolished. in 1978 and by this time I no longer practiced criminal law but our law firm accepted all appointments on a pro-rata basis. For example: I was appointed to defend an indigent black man charged with murder. He received a minimum sentence and was placed on probation.

   Prior to 1977 when the Legal Services Office was established in the area, the Washington County Bar provided pro-bono services to indigent civil litigants. I accepted all referrals from the Bar. I handled many domestic matters, I recall one where there were lovely children who wanted to stay together and both parents were unfit. I was able to get the children into a home in a nearby community and they grew up as a family.

   Our law firm spent several years in a successful effort to redistrict the Washington County Court to obtain equal representation for the people of Washington County, Tennessee.

   I would estimate that I spent 5 to 10% of my time on services to disadvantaged persons.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that individually discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implemention of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

   I do not belong to an organization that discriminates on the basis of race, sex, or religion.

   Since 1965 I have been a member of Kiwanis. Kiwanis International formerly limited membership to men but has now opened membership to women. I am Chairperson of the Metropolitan Johnson City Kiwanis Club Membership Committee and we have approved all female applications for membership. We now have several women members in our Club.

   Since the early 1970s until March 1988, I was a member of the Benevolent and Protective Order of the Elks. Membership was limited to American males. The Elks Ladies Auxiliary was an intrigal part of the organization. Since this is a fraternal organization, I did not consider it discriminatory.

3. **Is there a selection commission in your jurisdication to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interview in which you participated).**

   There is no judicial selection commission in my jurisdiction.

   I was interviewed by Congressman James H. Quillen who submitted my name to the United States Justice Department. I was then contacted by a representative of the Justice Department and was invited for an interview. In April 1988, I was interviewed by Mr. Markman and Mr. Liebman. Thereafter, I was interviewed by Agents of the Federal Bureau of Investigation. I completed questionnaires for the Justice Department, the Federal Bureau of Investigation and the American Bar Association and now the Senate Judicial Ethics Committee. I was also interviewed by Mr. John Elam of the American Bar Association.

4. Has anyone in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

   No

5. Please discuss your views on the following criticism involving "judicial activism."

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and level of government.

   Some of the characteristics of this "judicial activism" have been said to include

   a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

   b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

   c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

   d. A tendency by the judiciary toward loosening jurisdiction requirements such as standing and ripeness; and

   e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I believe that a trial judge is bound first by the United States Constitution, secondly by the statutes and, thirdly, by the rulings of the Supreme Court and the Court of Appeals.

Assuming the court has jurisdiction of the parties and the subject matter, the judge must hear the case fairly, without fear or favor, and decide the issues joined in that particular case between the parties. The trial court should not legislate or assume the functions of the Executive branch of government.